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LEGAL BIOGRAPHY.

LIFE OF LORD CHANCELLOR ELDON.*

[SIR JOHN SCOTT.]

IT is the peculiar praise of the English aristocracy that it is accessible to every class of people. There is no impassable gulf between even the lowest order of the peasantry and the highest rank of nobility. Nothing is required but superior merit to pass from one to the other.

It is for this reason that the *study of the law* has enriched the English aristocracy with some of its most distinguished ornaments. *Nearly one third of the whole nobility of England are either lawyers or the descendants of lawyers.* The constitution reaps a double advantage from this distribution of its honors. In the first place, the laws are doubtless best supported by those who best understand them, or who, even if they have no professional knowledge, have, at least, an hereditary veneration for the means of their elevation. Hence, indeed, the House of Lords has ever been peculiarly considered to be the best guardian of the constitution in general, in the same manner as the popular rights are understood to be the peculiar care of the Commons. It is a second most undoubted good resulting from the same cause, that, un-

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der the contemplation of the high honors to which professional excellence may elevate its possessors, the students of the law are encouraged to greater efforts, and these efforts naturally lead to excellence. There are men who would be invincible by money, but who yield to honors. Neither lord Hale, nor lord Coke, nor lord Mansfield, would have embraced the profession, had they not promised themselves more than the bounty of their clients.

These remarks are naturally suggested by the subject of the present biography; who, by superior industry united to superior talents, has overcome the obstacles of inferior station, and raised himself to the highest honors of the state. Something of this, perhaps, may be imputed to fortune; but what is peculiarly his own, is, that he has accomplished this elevation without having become the instrument of a court or minister; that he has *forced his way* by his own talents and owes nothing to the minister of the day, but that he had discrimination enough to discover his own worth, and public spirit enough to call it into exercise.

John Scott, now lord Eldon, was born in the town of Newcastle-upon-Tyne, about the year 1774. His father, Mr. William Scott, was a coal or rather corn merchant in the same place; but who having a narrow capital, could seldom trade on his own bottom. His chief business therefore consisted in the freight of corn or coals to the metropolis. According to the best accounts, he did not succeed, and was never above a very slender mediocrity. His reputation, however, was untainted—he was superior to his business; and fortune, or rather providence seems to have indemnified him for his own obscurity by the honors of his sons. From the narrow profits of his business he contrived to give his children that education which has been the basis of their greatness. His two sons, John and William, were accordingly sent to a classical school, and as they boarded at home, the

expenses were rendered more moderate. There are yet living many respectable tradesmen in New-castle, who remember to have seen the present lord Chancellor and Judge of the Admiralty, "with satchel on their backs, and fresh morning face," proceeding from their father's house to the free grammar school.

The progress of the children rewarded the care of their parents. John Scott early distinguished himself for solidity of judgment, and an understanding, which, in proportion to its slowness, was deep and comprehensive. He is said, therefore, to have learned slowly, but to have learned thoroughly. His attention was always at his command, and once fixed upon a subject was irremovable until he had examined it in all its parts. This is, in fact, the present character of the Lord Chancellor. He is considered at the bar, as he formerly was at school, as possessing a mind more solid than quick; very slow in determining, but always right. We believe that he has never had a judgment reversed. The late preceding Chancellor, Lord Erskine, was accustomed to say that the House would only lose its time by listening to appeals from the judgment of his predecessor—that they had only one character—they were brought only to gain time, and to run the life of one party against the other.

It was the decided opinion of Earl Mansfield, and an opinion recommended by his own peculiar excellence, that no eminence could be expected in the study of the law unless previously laid in classical learning "It is not sufficient," said his lordship, "that the student of the law should understand the *dog-latin* which is used in his profession; this is a jargon, indeed, which has its use, inasmuch, as by long habit it has been brought to convey a precise meaning. The student, if he really aim at excellence, must form his taste and his understanding by the ancient models; it is in these only that he can learn to unite eloquence and reasoning—the utmost powers of the understanding with the discreet use of the

imagination. "The elements of the law, moreover," says the same authority, "are hidden behind a latin veil, and the most excellent learning must be lost to him who has not skill enough to raise it at his pleasure. Let the law student, therefore, possess himself of this key to ancient treasures."

The father of Lord Eldon entertained the same opinion; and though himself a man of narrow learning, spared no efforts to cultivate the understanding of his children. William Scott had a quickness of parts much superior to his brother, but their father, a man of much natural penetration, was not deceived by this external blazonry; and, if report may be credited, always predicted that John would be the more eminent. "The country," said he, "cannot produce such a boy as John; under that heavy stupid eye and that watery head, he possesses a mind of which the world will hereafter know the worth."

After some years passed by them at the grammar school, in which John Scott obtained most learning, and his brother William most reputation, their father sent them to the metropolis to be duly entered in the temple.

The name of John Scott appears in the books in the year 1765, but his brother was not entered until the following year.

The two brothers continued to study together in the temple as at school. They lived in the same chambers, and had the same books. Sir William Scott has been heard repeatedly to acknowledge his obligations to the more penetrating judgment of his brother. One thing, indeed, Sir William appears to have learned almost solely from Lord Eldon: We need not say that we here speak of the habit of application. Lord Eldon, during the six or seven years which he employed at the temple, consumed at least six hours daily in the acquisition of professional knowledge. His lordship has subsequently reaped the full advantage of this

early application. He now possesses the reputation of being the most profound lawyer on the bench.

It may be thought, perhaps, that the proverbial slowness of his decisions contradicts this assertion. But the point of fact is, that this tardiness is the effect of the variety of his knowledge. His memory is so stored with cases, that he is perplexed by the multitude of seemingly contrary precedents. He has so many rules before him that he scarcely knows which to apply. He has to seek distinctions in cases exactly similar. If one case alone is in his *memory**, he would have no difficulty to decide in the moment. His decisions would be more absolute—if his *learning* was more narrow.

In the year 1777, Mr. John Scott was duly called to the bar. He made his appearance in Court with more reputation amongst his immediate friends than amongst the bar in general. He was considered by some as an object even of ridicule, for his very attempt to succeed; others, who knew him more intimately, boldly *avowed* his excellence, and predicted that a few years would place him at the head of his profession. Amongst these was a Mr. Thurlow, at that time Attorney-General. He had studied under the greatest pecuniary difficulties. He had supported himself, in common with Burke, by writing for Dodsley. Thurlow, therefore, had a sympathy for Mr. Scott. During an intercourse, at

[* In the zeal of panegyric, the biographer has here mentioned a quality which is highly advantageous to an Advocate, and also, though in a less degree, to the Judge. It is not his *learning* or *memory*, but his want of judgment,—that faculty which compares and discriminates,—which embarrasses the Lord Chancellor according to this writer. It would be well if such writers would content themselves with giving *the point of fact*, without attempting to analyze the mind. They are not competent to the task, and their presumption generally produces some such bungling as is here exhibited. He seems moreover not to know the difference between learning and memory, or, rather, to think them synonimous terms.]

first merely casual, he discovered the talents and acquired knowledge of Lord Eldon. This was sufficient for Thurlow, who, in the consciousness of talents, venerated them in others He immediately cultivated the acquaintance of Mr. Scott; and, by his direct encouragement, was the means of introducing him to the world.

Mr. Scott was for a considerable time kept back by his own fault. "Two things," said Lord Thurlow "are necessary to a Counsel; confidence to push himself on the stage, and learning enough to justify him while he is there. Mr. Scott had a timidity of nature—an awkwardness of address, which kept him in the back ground.

Several years after he was called to the bar, nothing would induce Mr. Scott to push himself into notice; on the other hand, he very patiently suffered himself to be pushed aside. The remonstrance of his immediate friends, and the encouragement of Thurlow, were equally ineffectual. Under the influence of this natural diffidence, he almost wholly withdrew himself from the Courts, and employed himself as a conveyancer or draftsman; a part of the law, which, from its connexion with ancient tenures, has been deservedly the favorite branch of the most eminent lawyers. Mr. Scott advanced his fortune more than his reputation by this practice. He doubtless proved himself the best conveyancer of the day; but this did not satisfy those who knew him likewise to be the best lawyer. They accordingly remonstrated with him, that having so much in his power, he contented himself with so little.

About this time commenced the well known professional jealousy between Mr. Alexander Wedderburne and Mr. Thurlow. Thurlow possessed the more manly mind; Mr. Wedderburne had the talent of application and the power of retention. Wedderburne was slow, but patient, industrious,

examining in detail what he could not comprehend as a system. He overcame every difficulty by his assiduity. His comparative slowness of parts was more than compensated by his superior industry. Thurlow could have learned more in an hour than Wedderburne in a day, but Thurlow could not be brought to apply himself for the hour, while Wedderburne had no difficulty to study for the day. Wedderburne, therefore, with very inferior talents, had advanced so rapidly on Thurlow, that it became a doubt amongst the profession which was the better lawyer.

Mr. Thurlow had now an object to accomplish, and he fixed upon Mr. Scott for his means and instrument. He was resolved to bring him forward as a rival to Mr. Wedderburne. Mr. Thurlow had a vanity beneath his acknowledged talents. It was as if he had said, I will bring forward a scholar who shall excel Wedderburne.

Mr. Scott, under his patronage, was soon pushed upon the stage in his own despite. Mr. Thurlow soon afterwards became Chancellor, and continued his patronage to Mr. Scott. Mr. Thurlow is reported to have offered his friend one of the masterships of the Court at that time vacant, and which Mr. Scott is said to have declined. It is impossible to conjecture any probable cause for the refusal. It is stated, indeed, that something of delicacy occured to prevent Mr. Scott from accepting this favor from his patron. It had been previously, we believe, promised to another. Mr. Scott became in a short time well known and much respected as a sound lawyer. Such a reputation is necessarily accompanied by an increasing practice; and Mr. Scott was so fortunate, that in the short space of three years, he is said to have amassed many thousand pounds. His clients were liberal in proportion to the merit of their advocate.

In the year 1783, Mr. Scott obtained a patent of prece-

dency, entitling him to the honors of king's Council. In the same year his practice was considered as increasing so fast that he was thought to be in the road of becoming one of the richest men at the bar. His professional success was accompanied by so much prudence and economy, that his expenditure bore no proportion to his income.

In the following year, 1784, the Fox ministry brought in the celebrated India bill; the result of which was, that the king resolved to rid himself of an administration which he suspected to be about to render itself independent of his authority. A difficulty here occurred. No one was willing to encounter the opposition of such a powerful administration. In this state of things, Mr. Pitt became known to his majesty; and as the confidence of this young man was at that period equal to his abilities, he was persuaded to undertake the vacant office.

Lord Thurlow consented to retain the seals; and, in the bustle of party changes, cast his eyes upon Mr. Scott. It was not, however, politically convenient to bring him in either as Solicitor or Attorney-General; so that his lordship was contented that he should be brought into parliament. Accordingly, in the new parliament, he was elected for the borough of Weobly, in Herefordshire. It was fully understood, however, that he accepted his seat conditioning that he should be permitted to vote independently.

The business of the first parliament of the administration of Mr. Pitt was such as required the most powerful talents. It has even been understood that the minister was, during this time, almost solely governed by Lord Thurlow; who, upon his own part, is said frequently to have consulted Mr. Scott, and to have derived much assistance from his solid judgment. Mr. Pitt's India bill is understood to have been framed between Lord Thurlow and Mr. Scott. Mr. Fox's bill was the most able measure; but Mr. Pitt had entered

into office upon the avowed principle, and even positive engagement, of decided opposition to this measure. Mr. Pitt therefore was compelled to produce something in its stead. He borrowed much of the matter and direct stipulations of Mr. Fox's bill; but, in order that the measure might appear his own, he sometimes departed widely from his original. The consequence was, as might have been expected. It was an expedient of the day.

Lord Eldon is supposed to have had a considerable share in the bill for prohibiting the commercial intercourse of the West India colonies with the United States of America.

The West-Indies depend so wholly upon America for their supply of timber and fuel, that the importation of the produce of the colonies had often actually been prevented by the interruption of this supply. The necessary operations of preparing sugar, cotton, &c. require a large stock of wood; and even the largest of the West-India islands, Jamaica, is not equal to a tenth part of the supply.

It was unfortunately represented to the English minister, that the Americans derived considerable profit from this trade; a profit to which their revolt and subsequent independence had not entitled them. It was added, that the British trader lost in proportion as the American trader gained; that if the woods of Canada, and New Brunswick, and Nova Scotia were fully equal to the supply of the colonies, and that the American trade were prohibitted, the English plantations must necessarily succeed to the supply. Resentment was listened to before prudence; and to avenge ourselves on the Americans, a prohibitory bill almost ruined the colonies.

If this bill had been imputed to Mr. Scott, it is necessary to acknowledge, that the repeal of it is attributed to the same advice. It is, indeed, a part of the character of Lord

Eldon, that, however slow in determininig, he is never obstinate in his decision—that his mind is open to argument, even after he has declared his opinion—that when convinced of his error, he never hesitates at the acknowledgment—and that he is as anxious to repair the effects of a mistake as others are to conceal it.

When, therefore, the unhappy effects of the American prohibitory bill were made known; when it was found that it had been productive of the most bitter and general distress, Mr. Scott was the first to propose in Parliament, that the obnoxious bill should be repealed. He was here, we believe, in opposition to Lord Thurlow, whose firmness too frequently bordered upon obstinacy.

The House, together with the minister, were of a different opinion; and concurred with Mr. Scott, that the mischief had been caused by the bill, and that the continuance of it would seal the ruin of the West India colonies. So much attention, however, was given to the pertinacious opposition of Lord Thurlow, that though the bill was repealed, another was substituted in its place, comprehending too many of the obnoxious restrictions. If this subject is again called before the House, we have no doubt that Lord Eldon will not disavow as Chancellor, the principles which he so ably supported as Mr. Scott.

The next important business in which Mr. Scott appeared with some eminence, and in which he is supposed to have assisted the minister, was the important subject of the "Irish commercial regulations." This unpleasant discussion, for such it eventually appeared, occupied the attention of the House during two succeeding sessions.

The principle of these resolutions is entitled to the praise of comprehensiveness. It will be found, as may be collected

from the resolutions, to be substantially as follows: That Ireland was entitled to a full participation of all the advantages of Great-Britain; that, as a sister kingdom, she had a most undoubted right to be put on a fair, equal, and impartial footing, with Great Britain, in point of commerce; and this, both with respect to foreign countries and our own colonies; that, in the mutual intercourse between each other, the equality should extend to manufactures, to importation and to exportation: and that, in return for these concessions, Ireland should contribute her full share towards the protection and security of the general commerce.

Throughout the whole discussion of the several resolutions, founded upon the above principle, Mr. Scott distinguished himself by many able speeches. The minister, accordingly was considered as regarding him with peculiar favor, and his fortune was already deemed in a fair way of being established.

The Irish resolutions have been much misrepresented in the course of the contests of the two countries. It is impossible, however, that we can deny their being founded upon a principle of equal indulgence and extent, and that the English minister thereby merited, in no slight degree, the gratitude of the Irish nation. Mr. Scott should here come in for his share of praise. But, from some unaccountable cause, the Irish have ever considered the proposed concessions in a very different point of view; and Mr. Scott is accordingly regarded by them as no friend to Ireland. The time, however may arrive, when that nation may think of him with more justice. Faction is often powerful enough to stifle truth, but, fortunately for the interests of mankind, never to extinguish it.

In the following session, Mr. Scott again presented himself to the attention of Parliament, upon the subject of the

commercial treaty with France. This treaty, though favorable to England, and not injurious to Portugal, with some of whose political regulations it interfered, excited alarm in the country gentlemen—an alarm at which, considering the subject at this distance of time, it is impossible to suppress surprise that this nation, so characteristic for its common sense, should have been so egregiously misled.

The opposition, however, availed themselves of the popular prejudices to harass the minister, and the debates were warm, long, and personal. Mr. Scott vindicated the treaty with his accustomed solidity of reasoning; and (what in a season of such party heats is so much to his credit) the personal attacks of his opponents could never either divert him from his argument or provoke him to personalities. He kept his argument and his temper, in despite of assaults on both.

Parliament and the kingdom were now attracted solely to one point, the impeachment of Warren Hastings. Mr. Scott possessed powers too active not to take a part in this important affair. He spoke on every point, which, in the course of this tedious trial, fell under the cognizance of Parliament. It is well known that the most interesting part of the impeachment was the daily contests between the Courts of Law on the one hand and those of the Parliament on the other. The advocates on both sides were the most able men of any time or nation.

Mr. Scott greatly distinguished himself in these discussions. From prejudices natural to professional men, he was considered as more peculiarly favoring the claims of the Courts. It must be confessed, however, that the Parliament seemed too much disposed to extend its jurisdiction, and to exempt itself from rules, to which, even as a Supreme Court, it should in natural reason, have been subjected. The rules

of evidence, and the limitations between what is evidence and what is not, are founded on natural equity; and there is, therefore, no sound reason why, any even Supreme Court of judicature, should adjudge itself above them.

The next business in which Mr. Scott took an eminent part—a part which immediately led to his future elevation—was the regency. Throughout the whole of this affair the minister is said to have been advised almost exclusively by Lord Thurlow and Mr. Scott. It becomes necessary, therefore, to enter into some detail upon a subject with which our future historians must connect the name of Scott.

On the 10th December, 1793, the report of the physicians, touching the state of his majesty's health, was presented to the House of Commons. Mr. Pitt, by the advice of Mr. Scott (now Solicitor-General) immediately proposed that a committee should be appointed to examine and report all the precedents of the proceedings of former Parliaments under circumstances of the interruption or suspension of the royal authority, whether by infancy, sickness, or other infirmity.

This committee was accordingly appointed; and the Attorney and Solicitor-General, together with the master of the rolls, were instructed to prepare the required report. Mr. Scott's learning and industry were here peculiarly conspicuous.

On the 12th, the report, which had been prepared, in fact before it was proposed, was proposed to the House. The precedents were chiefly three. The first was taken from the reign of Edward the Third. The Parliaments of those days, whether wisely or not, had provided a council about the king's person to act for him. The next precedent was in the reign of Richard the Second, when councillors were also appointed to exercise the regal power. The third pre-

cedent occurred in the reign of Henry the Sixth, during the infancy of that prince. Parliament was then called together by the king's second uncle, the first being still living, but out of the kingdom—and that act was ratified by Parliament, this grand council of the nation not deeming it sufficient that it was done by the authority of the duke.

It was contended by Mr. Pitt, Mr. Scott, and the Attorney-General, that in all these several precedents, the right of supplying the interruption of the royal authority was clearly in the Parliament: that the Parliament had been invariably consulted, in order to determine what was to be done—that in the course of their consultations they certainly considered with due respect, the right of the heir apparent—but that the right of the heir apparent required this confirmation of Parliament—that Parliament, therefore, having a right to reject, confirm, or prefer, had a most undoubted right to modify its trust and obligation.

Upon these principles, Mr. Scott, as Solicitor-General, was ordered to prepare the act of regency. This act, which was drawn with much ability, empowered his Royal Highness the Prince of Wales, to exercise the royal authority in the name and on the behalf of his majesty, during his majesty's illness, and to do all acts which might be legally done by his majesty. The limitations were, that the care of his majesty's person, and the management of his household, and the direction and appointment of the officers therein, should be in the queen—that the power to be exercised by the Prince should not extend to the granting of the real and personal property—to the granting of any office in reversion, or to the granting, for any other term than during his majesty's pleasure, of any pension, or any office whatever, except such as must by law be granted for life; nor to the granting of any rank or dignity of the peerage of this realm to any person, except his majesty's issue who have attained the age of twenty-one.

This act was rendered unnecessary by the unexpected recovery of his majesty. The conduct of Mr. Scott, however, during this affair, was no less able than honorable. He afterwards augmented his reputation by his support of the established church, against Mr. Fox's repeated motions for the repeal of the test act.

For these, and other services, Mr. Scott was made Attorney-General and knighted in the year 1793. The king received him upon his introduction with the most distinguished favor. His majesty seems, indeed, never to have forgotten the staunch friends who adhered to him during that melancholy crisis. Sir John Scott was considered as having become a member of that party, which, from the commencement of the present reign till this time, has retained its original name of the "king's friends."

As Attorney-General, Sir John Scott is regarded as having distinguished himself too much in favor of the prerogative, when it fell to his lot to have the conduct of the prosecutions which the government deemed it necessary to institute against the seditious leaders of the English convention. The times were full of peril and difficulty. A plan was formed to destroy the constitution and the government. That infamous body of men known by the name of the London Corresponding Society, was formed upon the direct plan of the French clubs. The plan was to unite, in the first place, small bodies of men; as soon as they reached a greater number, to divide them into smaller parties; and in this manner (as appeared by their letters and other documents) to spread from town to town, from village to village, and from hamlet to hamlet, till, as they explained it, there should not be an unenlightened man in the whole country.

The proclamation, by which they announced their object, was as singular for its boldness as for atrocity. They candidly avowed their purpose of purifying, as they called it,

the representation of the country. Openly accused the House of Commons of exercising a usurped authority, and professed their determined resolution to adhere together, and to unite themselves into one firm and permanent body, for the purpose of obtaining an adequate remedy for this intolerable grievance, by corresponding and co-operating with other societies united for the same objects.

Sir John Scott's speech, as Attorney-General, was deservedly reputed, as no inconsiderable specimen of his learning and eloquence. Some parts of it were peculiarly animated. In describing the Corresponding Society he used the following words:

"You will find them organized, prepared for emergencies, and exigencies, relying upon their own strength, and determined to act in combination. In some instances, acting with a secrecy calculated to elude observation; in others, proceeding directly by contrary means to the accomplishment of the same end. Representing their numbers as greater than they were, and, therefore, encreasing their number by the very operation of the influence of the appearance of strength. You will find them inflaming the ignorant, under the pretence of enlightening them; debauching their principles towards their country, under the pretence of infusing political knowledge in them; addressing themselves principally to those whose rights, whose interests are, in the eye of the law and constitution of England, as valuable as those of any men, but whose education does not enable them immediately to distinguish between political truth and the misrepresentation held out to them; working upon the passions of men, whom providence hath placed in the lower, but useful and highly respectable situations of life, to irritate them against all that its bounty has blest, by assigning to them situations of rank and property; representing them as their oppressors, as their enemies, as their plunderers, as those whom they should not suffer to

exist—and (in order at the same time to shut out the possibility of correcting original error, or rectifying the opinions of those whom they had so inflamed, misinformed, debauched, and misled) not admitting them into these affiliated societies till they had subscribed tests, the principles of which they were not to examine, after they had been admitted."

From some cause or other, to the general surprise of the country, as well as to the disappointment of government, the several accused persons were acquitted. It seems, indeed, to be the general persuasion, that the ministers had been ill advised when they brought them to trial on an indictment of *treason*. Had they been tried for *sedition*, there cannot be a doubt but they would all have been convicted; as the papers produced in evidence clearly made out a most atrocious case. The jury, on the other hand, considered it their duty to acquit them of treason.

Sir John Scott continued Attorney-General till the administration of Mr. Addington, when he became Lord Chancellor.

We have before had occasion to mention that he is regarded as being too tardy in his decisions. This, certainly, is an evil of the first magnitude in a Court which is itself but too slow in its process. It must be acknowledged, however, on the other hand, that this tardiness of his lordship is owing to his anxious eagerness for justice. He is unwilling to decide whilst there can be a possibility of doubt. The tardiness of the decision, therefore, is in some degree compensated by the rare occurrence of any appeal from the Judgment when once delivered.

Lord Eldon remained Chancellor till the death of Mr. Pitt, when he resigned the seals and was succeeded by Lord Erskine.

The discussion of the Catholic question having removed Lord Erskine, in common with the coalition administration, Lord Eldon was again invited to take the seals; and, we believe, was only induced to accept them by the particular request of his majesty. Lord Eldon is now considered at the head of his majesty's councils.

The following is no unpleasing specimen of the general style of Lord Eldon's eloquence. It is a part of his lordship's speech, on the trial of *Hardy* for treason.

"Gentlemen, it is the great province of a British jury, and God forbid these prisoners should not have the benefit of the reflection, that British juries are able to protect us all; are able to sift the characters of witnesses—to determine what credit is due to them—listening to men of good character without any impression against their evidence—listening to men such as I have stated, with a strong impression against their evidence; that impression, however, to be beat down by the concurrent unsuspicious testimony arising out of the rest of the case, if, upon the whole, you should find the case to be made out as I have stated to you.

"Gentlemen, I forgot to mention to you, that you will likewise find, about the time that this convention was talked of, that there was a new constitution framed for the corresponding society, in which they speak of a royalist as an enemy to the liberties of his country—of a democrat as a friend to the liberties of his country; and you will find, that in a constitution again revised, the whole was thrown into a scheme, and into a system, which was to add physical strength to the purposes of that convention, which was, I submit to you, to assume all civil and political authority.

"If you find all these things, and, if, under the direction of that wisdom that presides here, with respect to which, gentlemen, let me say again, that the situation of

this country is indeed reduced to a most miserable one, if the respect which is due to the administration of the law is suffered to be weakened in any manner. If the respect which is due to the administration of the law—that administration, which, perhaps, is the best feature of the constitution under which we live—is destroyed, miserable indeed must be the situation of your country! If you find under that direction that the case, being proved in fact, is also made out in law, you will do that on behalf of the public, which is due to your places, to the public, and to your posterity and theirs.

"But, on the other hand, if, after hearing this case fully stated, and attempted to be fully proved, you should be of opinion that it is not proved, or you should be finally of opinion that the offence is not made out according to the *hallowed* interpretation of the statute of Edward the Third, I say then, in the conclusion, I join from my heart, in the prayer, which the law makes on behalf of the prisoner, God send the prisoner a safe deliverance!"

Lord Eldon, it will not be contested, is signally qualified to preside, as he now does, in the Court of Equity. His legal information is extensive and profound, his attention to cases is vigilant and unweared, and his attachment to justice is as inflexible as his penetration in the discovery of truth is admirable. This is his praise. He is an honor to the laws which it is his important business to administer.

JURIDICAL SELECTIONS.

OPINION OF CHIEF-JUSTICE TILGHMAN,

ON THE VALIDITY OF THE SENTENCE OF A COURT-MARTIAL ACTING UNDER THE AUTHORITY OF THE STATE, WHERE THE MILITIA ARE IN THE SERVICE OF THE UNITED STATES.

BY the return to this *Habeas Corpus* and the evidence produced to the Court, it appears that E. Bolton, being a Private in Captain Clark's Company, 19th Regiment Pennsylvania Militia, was drafted in pursuance of General Orders of the government of September 5th, 1812. On the 31st March, 1814, he was found guilty of delinquency, in not marching according to orders, by a Court Martial held in pursuance of General Orders of the Governor, dated October 29th, 1813, and sentenced to pay a fine of sixty dollars, or undergo an imprisonment for twelve calendar months. The sentence was approved by the Governor, and Bolton was arrested by virtue of a warrant issued by the President of the Court-Martial, directed to the Marshal of Pennsylvania or his Deputy, no goods and chattels having been found on which the fine could be levied. Bolton asks to be discharged from imprisonment because the Court who convicted him, acting under the authority of the State, and not of the United States, had no jurisdiction in his case.

By the Constitution of the United States, article 1st, section 8th, the Congress have power " to provide for calling forth the Militia, to execute the laws of the Union, suppress insurrections, and repel invasions."

By virtue of this power, Congress may make laws to enforce their call, they may inflict penalties for disobedience, and erect Courts for trial of offenders—and they have exercised these powers. By the act of February 28th, 1795, section 1st, the President of the United States is authorised in case of invasion, or imminent danger of invasion, to call forth such number of the militia as he may judge necessary, and to issue his orders to such officer or officers of the militia as he may think proper. By the 4th section of this act, the militia employed in the service of the United States are subject to the same rules and articles of war as the troops of the United States. By the 5th section, every officer, non-commissioned officer, and private of the militia, who shall fail to obey the orders of the President of the United States in *any of the cases before recited*, shall forfeit and pay a sum not exceeding one year's pay, and not less than one month's pay, to be assessed *by a Court-Martial*, and be liable to be imprisoned, by a like sentence, on failure of payment of the fine, one calendar month for every five dollars of such fine; and by the 6th section, Courts martial for the trial of such militia, shall be composed of militia officers only.

By the act of April 13th, 1812, the President is authorised to require of the Executives of the several States, to organize and arm 100,000 of the militia and to call into active service, any part or the whole of them, in all the exigencies provided by the Constitution, and the officers, non-commissioned officers, musicians, and privates, are made subject to the penalties of the before mentioned act of February 28th, 1795. Whatever orders were given by the Governor, respecting the militia called for by the President, must be considered as given in pursuance of the call of the President, and the breach of those orders was consequently a breach of the orders of the President, and falls within the provisions of the act of February 28th, 1795. The question then is,

how is that act to be understood when it speaks of the sentence of *a Court-Martial?* The object of the act being to provide for the exercise of a power vested in Congress by the Constitution, it must be supposed, unless the contrary is expressed, that every thing directed to be done, was to be under the authority of the United States; when a Court-Martial then is mentioned, in general terms, the most reasonable construction is, that it was to be a Court under the authority of the President.

The provision in the 6th section, that the Court shall be composed of *militia officers only*, show clearly that there was no idea of a Court under *state authority*, for in such case the provision would be nugatory, as a State could pretend to no authority to constitute a Court of any other than *militia officers*. There are other reasons for supposing that it was the intention of Congress to keep the whole authority over the militia, called into actual service, in their own hands. It is of great importance to prevent the collision of clashing jurisdiction on this vital subject. The act of 1795 authorises the President to issue his orders immediately to any officer of the militia, without passing through the medium of the Governor, and I believe it to be a fact well known, that this precaution was introduced, in consequence of difficulties which had occurred in calling out the militia to suppress an insurrection in the western parts of Pennsylvania in the year 1794.

We have further evidence of the sense of the United States on this subject, by the act of April 18th, 1814, by the 1st section of which it is enacted, that "Courts martial, to be composed of militia officers alone, for the trial of militia drafted, detached, and called forth, for the service of the United States, whether acting in conjunction with the regular forces or otherwise, shall, whenever necessary, be appointed, held, and conducted, in the manner prescribed by

the articles of war, for appointing, holding, and conducting Courts martial for the trial of delinquents in the army of the United States." It appears then that whenever we consider the words or the object and spirit of the Constitution and laws of the United States, a Court Martial for the trial of offenders charged with disobedience of the orders of the President, can derive its authority from no other source than the United States. But it has been contended that the Governor by his own authority, as a commander in chief of the militia, may order a Court-Martial for the trial of persons who have disobeyed his orders. In answer to this it is observed, that the Governor issued his orders for calling out the militia expressly at the request of the President of the United States, so that it is in truth the order of the President, communicated through the Governor.

It is to be recollected too, that by the Constitution of Pennsylvania, article 2d, section 7th, the Governor ceases to be commander in chief of the militia when they are called into the actual service of the United States. This provision was necessary, because, by the Constitution of the United States, article 2d, section 2d, the President is "*commander in chief of the army and navy of the United States, and of the militia of the several States, when called into the actual service of the United States.*" Besides I know of no law of Pennsylvania which authorises the holding of a Court-Martial for the trial of offenders against the United States, and it would be extremely hard if there was; for it is certain, that no punishment inflicted under a state law could prevent the United States from prosecuting for the same offence on their own authority, nor would an acquittal by a State Court be any bar to a prosecution before a Court of the United States.

The granting that the Governor was not commander *in chief* of the militia, and therefore could not hold a Court-Martial by *his own authority*, it has been urged, that though

not *commander in chief*, he was still *commander* of the militia in the service of the United States, and as such might order a Court-Martial under the laws of the United States; and in proof of this construction of the Constitution have been cited the cases of the Governors of Pennsylvania and New-Jersey, who commanded the militia in person in the insurrection of 1794, and of the Governors of Ohio and Kentucky, who took the field and retained the command of their militia in the late war. What passed between the President of the United States and those Governors, or by what authority they exercised their commands, or what rank they held in the army of the United States, I am not informed, nor is it necessary to make a question of it on the present occasion, because the Governor of Pennsylvania did not take the field, but remained in the exercise of his authority at home, while the militia marched under the command of inferior officers.

Now it will not be pretended, that the President of the United States ordered the Governor, or had power to order him into actual service. The sovereignty of the State protects him from such an order; he still remains commander in chief of all the militia not in the actual service of the United States, and he has civil duties of so imperious a nature as may render his presence at the seat of government indispensable, for no law law can be enacted without him.

On no ground, then, which has been taken, nor on any other ground which I can perceive, can the proceedings of this Court Martial be supported. The offence was against the United States, and should have been prosecuted under their authority. But it was prosecuted under the authority of the State of Pennsylvania—the Sentence, therefore, was void, and we must direct that the prisoner be discharged.

OPINION OF CHIEF-JUSTICE MARSHALL

ON THE SAME SUBJECT.

William Meade v. *The Deputy-Marshal of the Virginia District.*

MOTION TO BE DISCHARGED UNDER A WRIT OF HABEAS-CORPUS.

BY the return of the Deputy-Marshal it appears that William Meade, the Petitioner, was taken into custody by him and is detained in custody on account of the non-payment of a fine of forty eight dollars assessed upon him by the Sentence of a Court-Martial for failing to take the field in pursuance of general orders of the 24th of March, 1313, the Marshal not having found property whereof the said fine might have been made.

The Court-Martial was convened by the following Order:

November 8th, 1813.

BRIGADE ORDERS.

A General Court-Martial to consist of Lieutenant Colonel Mason, President, &c will convene at the Court-house in Leesburg, on Friday, the third day of next month, for the trial of delinquencies which occurred under the late requisition of the Governor of Virginia and Secretary of War, for Militia from the county of Loudon.

(Signed) HUGH DOUGLAS.
Brig. Gen. 6th Brig. Va. Mil.

The Court being convened, the following proceedings were had. It appearing to the satisfaction of the Court that the following persons of the county of Loudon were regularly detailed for militia duty and were required to take the field under general orders of March 24th, 1813, but re-

fused or failed to comply therewith, whereupon this Court doth order and adjudge, that they be each severally fined the sum annexed to their names, "to wit, William Meade forty-eight dollars." On the part of the Petitioner the obligation of this Sentence is denied:

1st. Because it is a Court sitting under the authority of the State, and not of the United States.

2d. It has not proceeded according to the laws of the State, nor is it constituted according to those laws.

3d. Because the Court proceeded without notice.

1. The Court was unquestionably convened by the authority of the State and sat as a State Court. It is however contended that the Marshal may collect fines assessed by a State Court for the failure of a militia man to take the field in pursuance of orders of the President of the United States. The Constitution of the United States gives power to Congress to provide for calling forth the militia to execute the laws of the union, &c. In the execution of this power, it is not doubted that Congress may provide the means of punishing those who shall fail to obey the requisition made in pursuance of the laws of the union, and may prescribe the mode of proceeding against such delinquents, and the tribunals before which such proceedings should be had. Indeed it would seem reasonable to expect that all proceedings against delinquents should rest on the authority of that power which had been offended by the delinquency. This idea must be retained while considering the acts of Congress. The first section of the act of 1795 authorizes the President "whenever the United States shall be invaded, or in imminent danger of invasion" to call forth such number of the militia of the State or States most convenient to the place of danger or scene of action, as he may judge necessary to repel such invasions, and to issue his orders for that purpose

to such officer or officers of the militia as he may think proper."

The 5th section enacts, "that every officer, non-commissioned officer, or private of the militia, who shall fail to obey the orders of the President of the United States in any of the cases before recited, shall forfeit a sum not exceeding one year's pay and not less than one month's pay, to be determined and adjudged by a Court Martial." The 6th section enacts, "that Courts martial for the trial of militia shall be composed of militia officers only."

Upon these sections depends the question whether Courts martial for the assessment of fines against delinquent militia men should be constituted under the authority of the United States, or of the State to which the delinquent belongs. The idea originally suggested, that the tribunal for the trial of the offence should be constituted by, or derive its authority from the government against which the offence had been committed, would seem to require that the Court thus referred to in general terms, should be a Court under the authority of the United States. It would be reasonable to expect that if the power were to be devolved on the Court of a state government, that more explicit terms would be used for conveying it. And it seems also to be a reasonable construction, that the legislature, when in the 6th section providing a Court-Martial for the trial of militia, held in mind the offences described in the preceding section, and to be submitted to a Court Martial. If the offences described in the 5th section are to be tried by a Court constituted according to the provisions of the 6th section, then we should be led by the language of the section to suppose that Congress had in contemplation a Court formed of officers in actual service, since the provision that it "should be composed of militia officers only" would otherwise be nugatory. This construction derives some aid from the act of 1814. By that act Courts Martial for the trial of offences such as that

with which Mr. Meade is charged, are to be appointed according to the rules prescribed by the articles of war. The Court in the present case, is not appointed according to those rules. The only argument which occurs to me against this reasoning grows out of the inconvenience arising from trying delinquent militia men who remain at home, by a Court-Martial composed of officers in actual service. This inconvenience may be great and well deserves the consideration of Congress—but will not aid in so construing a law as to devolve on Courts, setting under the authority of a State, a power which, in its nature, belongs to the United States. If however this should be the proper construction, then the Court must be constituted according to the law of the State.

On examining the Laws of Virginia, it appears that no Court-Martial could be called for the assessment of fines on the trial of privates not in actual service. This duty is performed by Courts of Enquiry, and a second Court must sit to receive the excuses of those against whom a previous Court may have assessed fines, before the Sentence becomes final or can be executed. If it be supposed, that the act of Congress has conferred the jurisdiction against delinquent militia privates on Courts martial constituted as those are for the trial of officers, still this Court has proceeded in such manner that its Sentence cannot be sustained.

It is a principle of natural justice, with which Courts are never at liberty to dispense, unless under the mandate of positive laws, that no person shall be condemned unheard, or without an opportuity of being heard.

There is no law authorising Courts martial to proceed against any person without notice, consequently such proceeding is entirely unlawful. In the case of the Courts of Enquiry sitting under the authority of the State, the practice has, I believe prevailed, to proceed in the first place

without notice, but this inconvenience is in some degree remedied by a second Court, and I am by no means prepared for such a construction of the act as would justify rendering this Sentence final without substantial notice. But be this as it may, this is a Court-Martial, not a Court of Enquiry, and no law exists authorising a Court-Martial to proceed without notice. In this case the Court appears so to have proceeded; for this reason, I consider its Sentences as entirely nugatory; and do, therefore, direct the Petitioner to be discharged from the custody of the Marshal.

OPINION OF THE GENERAL COURT OF VIRGINIA,

ON THE CONSTITUTIONALITY OF AN ACT OF CONGRESS,

Giving Jurisdiction to a Court in a Case arising under the Revenue Laws.

DELIVERED BY JUDGE WHITE.

THIS is an Action of Debt, brought by the Plaintiff to recover a *Penalty* inflicted by an act of Congress to insure the collection of the revenue of the United States, which *Penalty*, the same act says may, under circumstances such as exist in this case, be recovered in a State Court; and the question submitted to the General Court is substantially this: "Could Congress constitutionally give to a State Court jurisdiction over this case, or can such Court be authorised by an act of Congress to take cognizance thereof"?

The very statement of the question points out its extreme delicacy and great importance. It involves the great constitutional rights and powers of the general government, as well as the rights, sovereignty, and independence of the state governments. It calls upon this Court to mark the

limits which separate them from each other. and to make a decision which may possibly put at issue, upon a great constitutional point, the Legislature of the United States and the Supreme Criminal Tribunal of one of the States.

Such a question, involving such consequences, ought to be approached with the utmost circumspection, with the most cool, dispassionate, and impartial investigation, and with a fixed determination to render such Judgment only as shall be the result of solemn conviction. The Court has not been unmindful of these things. It has approached the subject with those feelings and with that determination. It has bestowed its best consideration, its deepest reflection, upon it; and after viewing it in every point of light in which it has been placed by others, or in which the Court has been able to place it, has made up an opinion in which all the Judges present concur, and which it has directed me to pronounce.

But before that is done, it will be necessary to lay down and explain certain principles on which it is founded.

First—It is believed, that the Judicial Power of any State or Nation, forms an important portion of its sovereignty, and consists in a right to expound its laws, to apply them to the various transactions of human affairs as they arise, and to superintend and enforce their execution—and that whosoever is authorised to perform those functions to any extent, has of necessity to the very same extent the judicial power of that state or nation which authorised him to do so.

Secondly—That the Judiciary of one separate and distinct sovereignty, cannot of *itself* assume, nor can another separate and distinct sovereignty either *authorize* or *coerce* it to exercise, the judicial powers of such other separate and distinct sovereignty.

It is indeed true, that the interest of commerce, and the mutual advantages derived to all nations by their respectively protecting the rights of property to the citizens and subjects of each other, whilst residing or trading in their respective Territories, have induced civilized nations generally to permit their Courts to sustain suits brought upon contracts made in foreign countries, and to enforce their execution according to their true intent and meaning. And in order to ascertain that, our Courts do permit the laws of the country, where the contract was made, to be *proved* to the jury, or the Court of Chancery, as the case may be, as *facts* entering essentially into the substance of the contract. But, in doing all this, they do not act under the *command* or by the *authority* of the sovereign of that nation. Nor are they exercising any portion of its judicial powers. They are only expounding, applyng and superintending the execution of *the law* of their *own* State, which authorises that mode of proceeding.

But though there are the best reasons for permitting our Courts to sustain suits of this description, there is no good reason why one nation should authorise its Judiciary to carry the penal laws of another into execution, and it is believed, that no nation has ever done so. And, as has already been stated, there is no principle of universal law, which authorises one sovereign to *empower* or *direct* the Judiciary of another to do so. Such a right can be acquired by compact only. And we shall presently see whether Congress has so required it. Without such compact, a fugitive from justice cannot even be demanded, as of right, to be delivered up to the *tribunals* of the *nation whose laws he has violated*, much less can he be tried and punished by a foreign tribunal for violating them.

If such a system shall once be adopted it will introduce a strange kind of mosaick work into the Judiciary of nations. Here a Cadi sitting in Judgment upon an Italian denying

the Pope's infallibility. There the stern fathers of the Holy Inquisition putting a poor Turk to the rack because he denies that Mahomet is the prophet of God. The Judges of republican Virginia pillorying an Englishman for libelling royalty And the Court of King's Bench inflicting the same punishment upon an American for libelling the government of the United States for the late declaration of war.

Thirdly—That the government of the United States, although it by no means possesses the *entire* sovereignty of this vast empire, the residuum thereof still remaining with the States respectively, is nevertheless, as to all the purposes for which it was created, and as to all the powers vested therein, unless where it is otherwise provided by the Constitution, completely sovereign. And that its sovereignty is as entirely separate and distinct from the sovereignty of the respective States, as the sovereignty of one State is separate and distinct from that of another. So that unless as before excepted, it cannot exercise the powers that belong to the state governments, nor can any state government exercise the powers which belong to it. And there is no one thing to which this principle applies with more strength than to the revenue of the United States and things appertaining thereto. It being notorious that a desire to give Congress complete and entire control over that subject was the great and moving principle which called the present Constitution into existence. It is admitted, however, that there are some exceptions to this last principle; they are such, however, as only prove the rule itself. Thus by the second section of the third article of the Constitution, among other things it is declared, that "the judicial power of the United States shall extend to controversies between citizens of different States, between citizens of the same State, claiming lands under grants of different States," &c. These powers in the nature of things belonged to the state sovereignties, and they were, at the time of the adoption of the Constitution, in complete posses-

sion of them, nor could the Courts of the United States, *merely as such*, by any principle of construction, have claimed them; there were reasons at that time deemed sufficient to justify the extending the judicial power of the United States to them, and they were extended to them, without, however, taking away the jurisdiction of the State Courts; so that as respects those matters, the State Courts and the Courts of the United States have concurrent jurisdiction *by compact*.

These things being premised, I return to the question. Can Congress, by any act which it can pass, authorise the State Courts to exercise, or *vest* in them, any portion of the judicial power of the United States; more especially that portion of it which is employed in enforcing their *penal laws?*

I shall not stop here to prove that the act in question is, as respects this case, a penal law, or that to enforce the payment of its *penalties*, in any way or form whatsoever, would be to execute, to enforce it. These are self-evident propositions which would only be obscured by any attempt to elucidate them.

Nor shall I waste much time in considering whether our Courts can resist an unconstitutional law. That question as it respects our state laws, has long since been settled in Virginia, and the decisions of her courts have been acquiesced in by the General Assembly, with that wisdom and magnanimity which belongs to it.

The argument is much stronger as respects the laws of Congress, the Legislature of a separate and distinct sovereignty, by whose laws we are not bound, unless, to use the very words of the constitution, they are "*made in pursuance thereof.*" Was it it otherwise, were the state courts obliged to execute every law which Congress might pass, without

enquiring whether it was or was not made *in pursuance of the constitution*, it is most manifest that the justly dreaded work of consolidation would not only be begun, but that, in principle, it would be completed; and that state sovereignty and state independence would soon cease to exist.

We have already seen that the government of the United States is, as to the purposes for which it was created, a separate and distinct sovereignty, having rights, powers, and duties, which it is bound to exercise and discharge itself, and which it cannot communicate to the States over which it presides, and which they cannot intermeddle with, and that the judicial power forms a portion, and a most important portion it is, of its sovereignty.

We have seen that there is nothing in the universal law, or the usage of nations, which will authorise one sovereignty to invest its judicial power, or any part of it, in the courts of another, or direct them to execute it: more especially that portion which respects its *penal code*.

If then Congress has a right to vest *that*, or any other portion of the judicial power of the United States, in the state courts, it must be in virtue of some compact. But there is no other instrument from which such a compact can be inferred but the constitution of the United States. Let us then see where it has deposited the judicial power of the general government, for where it has placed it, there it must remain.

That instrument does not take the least notice of the state courts as respects this subject. But it declares, section 1st of the 3d article, that "the judicial power of the United States *shall* be vested in one supreme court, and in such inferior courts as Congress may from time to time ordain and establish." And by the 8th section of the 1st article, power is given to Congress, "to constitute tribunals inferior to the Supreme Court."

This judicial power then, the *whole* of it, *without any exception*, is given to this supreme court, and those inferior courts to be *ordained and established* by Congress. It has never yet been contended that Congress can compel or authorise the state courts, or any of them, to perform the functions of this supreme court. By what kind of reasoning then can it support a claim to exercise such a power with respect to the functions of these inferior courts: Did Congress ordain *and* establish the state courts? Did it decree their existence? Did it appoint their Judges? Did it institute, did it settle, did it *constitute* them? Most certainly it has done none of those things. It found them *already* ordained, established; and finding them so ordained *and* established, it has by *its law* directed them to exercise this portion of the judicial power of the United States.

But the Judges of these inferior courts are to have *offices* which they are to hold during good behavior. Now I take it for granted, that the man who holds an office is an officer, and an officer too of that government whose business it is the duties of his office to perform. And by the 3d section of the 2d article of the Constitution, "all officers of the United States are to be commissioned by the President," which the State Judges are not.

But who does the Constitution intend shall decide upon the good behavior of the Judges of the inferior courts? Most unquestionably the Senate of the United States, upon impeachment by the House of Representatives. So great an absurdity cannot be supposed, as that the Constitution intended to put the judicial power of the United States, or any part of it, into the hands of Judges in no wise responsible to its government. Yet no man can pretend that the State Judges can be impeached and tried by that government.

Besides, the Constitution of the United States does not provide that the *State Judges* shall hold their offices during

good behavior. Congress cannot direct that it shall be so by law; and, in fact, some of them are elected for a limited period, and others may be removed by the vote of their state legislature. So that if a law of Congress should be very unpopular in one of those states, the Judges could not execute it but at the risk of their commissions.

Moreover, the Judges of the state courts are called upon by this act to exercise judicial power, which they hold at the *will* of Congress, and which may be taken from them by the very breath which gave it—and which, it is almost certain, will be taken from them, whenever by a firm and independent exercise of their own judgments they shall much offend that honorable body. So that under this system, neither the people, nor the government of the United States would have that security for the uprightness of their judges which the Constitution contemplates.

But the Judges of these inferior courts are also to receive for *their services* compensation which shall not be diminished during their continuance in *office*, nor during the existence of a particular *law* calling for *particular services*.

From whom are they to receive compensation? Certainly from the general government, to which those *services* are to be rendered. But do the State Judges receive, or are they to receive any compensation for *these services* to be rendered to the United States? Every body knows that they do not. And we know, that if any Judge of this state was to accept either commission or compensation from the general government, he would by that act vacate his office.

But it is said that the state courts do take cognizance of suits brought to enforce contracts made in foreign countries, and that they will take notice of those foreign laws, under the faith of which such contracts were made, and enforce them agreeably thereto, and that this suit sounds in con-

tract. But how does it sound in contract? Has the defendant contracted to pay the amount of this *penalty* to the plaintiff? No, it is answered, it is not precisely so. But it is understood to be a principle of universal law, that every citizen and subject has entered into an *implied* contract, that he will obey the laws of his country—that the laws of his country subject the defendant to the payment of this *penalty* —that this suit is founded on that contract, and the state court has for that reason jurisdiction over it. Indeed! But before we yield our assent, let us see how far this reasoning will carry us. It is sometimes said, that an argument which necessarily proves too much, proves nothing.

By this same *implied* contract, every citizen and subject of every government, has agreed to submit his head to the block, or his neck to the cord, whenever the laws of his country require him to do so. If, therefore, this implied contract will give us jurisdiction over this *penal* law, and justify us in enforcing its *sanction*, the same principle will give us jurisdiction over the entire penal code of every nation upon the earth, which no man can pretend to say we have.

Upon the whole, however painful it may be, and actually is, to us all, to be brought, by a sense of duty, into conflict with the opinions and acts of the Legislature of the United States, for which we entertain the highest respect, and the constitutional laws of which we feel it our duty to obey and execute with cheerfulness, when their execution devolves upon us; yet we cannot resist the conviction, that this law is, in this respect, unconstitutional. It is the unanimous opinion of this Court, that to assume jurisdiction over this case, would be to exercise a portion of the judicial power of the United States, which, by the Constitution, is clearly and distinctly deposited in other hands: and that by so doing, we should prostrate that very instrument which we have taken a solemn oath to support.

OPINION OF THE COURT OF APPEALS OF VIRGINIA,

On the Constitutionality of an Act of Congress, authorising a Writ of Error from the Supreme Court of the United States to a Supreme Court of a State.

A Case was cited from the records of the General Court of Virginia, from which it was apparent that that court, the highest criminal tribunal in the state, had declined executing a *penal* law of the Congress of the United States. An allusion was at the same time made to a most important case then pending before the Court of Appeals, wherein this point was involved:

"Whether a law of Congress, which authorises a Writ of Error to issue from the Supreme Court of the United States to a Judgment of the Supreme Court of a State, be constitutional or not?"

We have now to state that this case was finally decided by the Court of Appeals, and that all the Judges who were on the bench (the whole Court being present with the exception of Judge Coulter) unanimously declined obeying the mandamus of the Supreme Court of the United States.

As it is due to the State to have the points in this case, and the principles on which they were decided, stated at length, we shall hereafter attempt to procure an abstract of the whole. In the mean time we shall cursorily observe, that the case began several years ago, in the District Court of Winchester; that it went up to the Court of Appeals, where it was decided against the appellee;—that, by a writ of error, it was brought before the Supreme Court of the United States, who finally issued a mandamus to the Court of Appeals, directing them to enter up a Judgment in favor of

the appellant in the Court of Appeals. Had they a right under the Constitution of the United States to issue this mandamus? In approaching this question, the Court of Appeals appeared to spare no pains to arrive at the truth. They called upon the ablest counsel at the bar for their disinterested opinions. The Court themselves took nearly two years in maturing and making up their Judgment. There was no precipitation; but, on the contrary, every effort was made to collect light and administer justice. The opinions of the four Judges bear the strongest marks of their laborious and disinterested researches. The decision has at length gone against the jurisdiction of the Supreme Court of the United States, as will appear by the following extract from the records of the Court of Appeals:

Philip Martin v. *David Hunter.*

On a Special Mandate from the Supreme Court of the United States.

The Court is unanimously of opinion that the appellate power of the Supreme Court of the United States does not extend to this Court, under a sound construction of the Constitution of the United States. That so much of the 25th section of the act of Congress to establish the Judicial Courts of the United States as extends the appellate jurisdiction of the Supreme Court to this Court, is not in pursuance of the Constitution of the United States. That the writ of error in this case was improvidently allowed under the authority of that Court. That the proceedings thereon in the Supreme Court were *coram non judice*, in relation to this Court; and that, obedience to its mandate be declined by this Court.

TRIAL IN SOUTH-CAROLINA,

FOR VIOLATING THE FREEDOM OF ELECTION.

State v. *Fargues M'Dowell.*

THIS was an indictment upon the following clause of the 11th section of the Election Law, A. D. 1721, Brevard's Digest, vol. 1, p. 276:

"If any person or persons whatsoever, shall, on any day appointed for the election of a member of the Commons House of Assembly as aforesaid, presume to violate the freedom of the said election, by any arrests, menaces, or threats, or endeavor or attempt to overawe, fright, or force any person qualified to vote, against his inclination or conscience; or otherwise by bribery obtain any vote; or who shall, after the said election is over, menace, despitefully use or abuse any person, because he hath not voted as he or they would have had him; every such person so offending, upon due and sufficient proof made of such his violence or abuse, menacing, or threatening, before any two justices of the peace, shall be bound over to the next General Sessions of the Peace, himself in fifty pounds current money of this province, and two sureties, each in twenty-five pounds of like money, and to be of good behavior and abide the sentence of the said court, where, if the offender or offenders are convicted or found guilty of such offence or offences as aforesaid, then he or they shall each of them forfeit the sum of fifty pounds current money of this province, and be committed to jail without bail or mainprise till the sum be paid."

The indictment stated "that Fargues M'Dowell, on the 10th of October, A. D 1814, with force and arms, at Georgetown in the district and state aforesaid, at an election then

and there holden, under and by virtue of the constitution of the said state, for one senator and four representatives and members of the General Assembly of the said state to represent the election district of Winyaw in the said state, the said 10th of October being a day duly appointed for the said election, did presume to violate the freedom of the said election by arrest, menaces, and threats; and that the said Fargues M'Dowell did then and there by arrest, menaces, and threats, endeavor or attempt to menace, fright, and force a certain Jacob R Parker (the said Jacob R. Parker, being then and there duly qualified to vote for the said senator and representatives and members of the said General Assembly) to vote against the inclination and conscience of him the said Jacob R. Parker, to the evil example of all persons in the like case offending, against the act of the General Assembly of the then province, now state of South-Carolina, in such case made and provided, and against the peace and dignity of the same state aforesaid."

The evidence adduced by the state proved, that Jacob R. Parker was convicted of an offence the previous term, and that a motion for a new trial was made, and the prisoner remanded to jail, with an order of Court that he should be bailed until his motion was determined. Parker not having obtained bail, M'Dowell permitted him to go at large with a promise that he should be subject to his control. The prisoner had, frequently during such license, driven the mail stage a considerable distance from town, and had generally lived with his family out of the jail and conducted himself according to his own will until the morning of the election, when M'Dowell sent for him and reprimanded him for having gone the preceding evening a few miles with a letter for one of the candidates who was obnoxious to him. After this preliminary conversation, the jailor interrogated him as to the manner he intended to vote, and finding that the obnoxious candidate was one of his favorites, he remonstrated with him on the impropriety of such a vote. Finding that

Parker was determined to vote for that gentleman, he resorted to the power of his office, and threatened to confine him if he voted for Mr. ..... He was hurrying the prisoner to jail when several gentlemen came up and remonstrated with him on the illegality of his conduct. All was unavailing; and the unhappy victim was committed to prison in despite of the constitution and laws of his country. A party of gentlemen, sometime afterwards waited on the defendant and again informed him of the heinousness of his offence. He was inflexible; and Parker remained his prisoner until the following morning, when he was bailed.

The Attorney-General, with the warmth and energy of the patriot, and the intelligence of the statesman and the lawyer, pourtrayed in glowing and correct colours the enormity of the transaction. The defence set up by Robert A. Taylor, Esq. was, the ignorance of the defendant, the humanity of his previous conduct, and the violation of the prisoner's parole of honor, concluding with an eloquent appeal to the jury not to minister at the altar of faction by surrendering his client a victim to the prosecution. His Honor Judge Nott, in a luminous and concise charge, explained the law and evidence to the jury, and commented upon the importance of preserving inviolate the elective franchise, by punishing the first attempts made against its purity. The jury retired; and in a few minutes returned a verdict of *Guilty*.

MISCELLANEÆ.

AMERICAN JURISPRUDENCE.

Supposed to be written by Mr. Rush, Attorney-General of the United States.

IT is truly gratifying to the patriotic observer of the enterprise which marks every line of human activity in the United States, that intellectual advancement seems to keep up at a fair and proportional pace with the physical energies that are almost hourly developing themselves. There is no one region of letters to which this remark may be better applied than to the profession of the law. America has a just title to be proud of the number of her able lawyers. At the close of the revolutionary war, and for full ten years afterwards, a book of American reports was scarcely to be met with in any one of the states. At the present day they have swelled to an amount not easy of recapitulation unaided by the periodical notices which so constantly announce some new addition to the number. Indeed the domestic law books, whether made up of reports merely, or consisting of treatises of a character more elementary, now occupy a place of gratifying conspicuousness in every professional library, and it need scarcely be added, are in every instance to be traced to the emulous and well bestowed industry of some one or other of the individuals who do such honor to the bar or to the bench of the country.

There is a line in which the talents of the American lawyer have been crowned with more illustrious chaplets of renown. Passing the limits of mere municipal acquirements

he has risen to the magnitude of the greatest occasions, and shown, when his country was the stake, with what dignity and effect he could put forth the highest qualifications of the civilian and the publiciste. Since the present century set in and at the close of the last, when the alternate injustice of enraged belligerents had beaten down or obscured some of the long established doctrines of international law, the public ministers of the United States, and with some distinguished exceptions they were lawyers, were seen to rescue them from a fate of total expulsion from the civilized code with which a course of retaliating violence seemed at one moment to threaten them; to clear away the entanglements which the subtle but brilliant adjudications of a cotemporary tribunal at London had in too many instances served to throw around them; and to re-assert with equal spirit, eloquence, and research, at both the British and French capitals, their pristine, sacred, and imperishable authority.

More recently at Ghent, how shall we estimate their important labors? Thrown into competition with the selected diplomatists of the first nation of Europe, who were backed too by the proximity of their court, whence, as to a fountain of refreshment, they could look when argument languished or when instructions became exhausted,—the commissioners of this remote republic, resting upon the independent foundation of their country and their cause, with no prompters but their own genius, their own circumspection, and their own knowledge, and with assembled nations as spectators of the successive displays of polemic skill which the turn of the discussion seemed so largely to have run into, acquired a fame which dispassionate judges have acknowledged and which is destined to shine durably in the pages of their country's history. Our recollections in diplomatic controversy supply us with no specimens of excellence in a dignified temper, in an applicable erudition, and in a chastened

style, beyond those stamped upon the letters of the American commissioners. We think we hazard little in supposing that the archives of the congresses of Chambray, of Soissons, or of Vienna, would not really afford state papers in contradiction of the remark.

If we were inclined to run a parallel between the mind of this country and that of Europe, but especially of Britain, we know of no line to which we could so fairly resort as to that of the law. Here it is where we think that a test of the relative intellectual cultivation and force of the two hemispheres may be found with the fewest intrinsic disadvantages to ourselves in the comparison. The theory upon this subject may be plainly resolved into this. That the prodigiously greater incentive which is forever applying itself to mind in Europe, rouses it into more keen action and gives it momentum towards purposes which it does not yet require, and which therefore it cannot be supposed to reach here. A numerous and condensed population; an infinitely intricate organization of society, producing habits and tastes not merely artificial, but in the highest degree fastidious and dainty in a countless variety of ways; every possible avenue in which human genius can exert itself, thronged with the most eager competition; the spectres of poverty at hand to reanimate, by their powerfully stimulating admonitions, flagging industry with resulting rewards, proportioning their incitements to the difficulty and the rarity of success,—these, and not royal munificence, have in all countries been the essential promoters of literature and the arts.

In the department of jurisprudence the United States probably approach, if not in all of these, yet in other great excitements of mind, nearer to a par with the old nations than in any other that could be named. Here the law is every thing. It makes its appeal to the strongest motives of interest and of ambition. In most instances it leads to a comfortable subsistence; and in many to independence and

wealth. To public honors, if so they are to be denominated, it unquestionably opens a wider door than any other pursuit. But we do not mean to dwell upon the connexion in this country between politics and the law, which would open a space that it is not our purpose on this occasion to occupy. The unbounded freedom of our institutions begets, throughout every portion of the country, a corresponding latitude of conduct and of discussion, which exultingly and fiercely disdains to acknowledge any limit or any regulator but the law. Hence the habit of bringing every thing to its test. The bolts of criticism shot from the most exalted heights of intellect on the one hand, and the shafts of unlettered simplicity upon the other, a Burke or a Jack Cade may fall in eloquent vengeance or in harmless mirth upon this profession; but in a country of equal rights it has ever been a formidable engine of influence in public affairs, and scarcely less of credit and authority in private life. We can only mean, when it is associated with those strict principles of probity and honor which only constitute its first ornament, but without which it is impossible that it can ever in any country signally and ultimately prosper So endowed, it is, after all in the beautiful words of the first Vinerian lecturer, a profession which employs in its theory the noblest faculties of the soul, and exerts in its practice the cardinal virtues of the heart.

As we outstrip England in her freedom, there is a still greater call amongst us for those who are found to be so usefully its ministers. It is like the rule of the political economist in all other cases, where the supply of the commodity adapts itself to the demand. It may be that the English loom makes a demand for ten or for twenty workmen where the American as yet does for one. Hence the comparative extent, variety, and perfection, of their manufactures. But it is probable that the habits, the manners, and the contentions of the universally thriving and self-

supported freemen on this side of the Atlantic, call for at least a couple of lawyers, take the two countries throughout, where the English do for one. Considering Burke's assertion in 1775, that nearly as many of Blackstone's Commentaries were sold in the American colonies alone, at that period, as in all England, we think it may be agreed that we set down the proportion at a safe rate. The noble definition of law, that nothing is so high as to be above its reach or so low as to be beyond its care, is probably true to a greater practical extent in this country than in any other. The cause obviously is, not our liberty alone, but an alliance between an active and restless spirit of freedom and the comfortable condition of all classes of the community, not excepting, relatively considered, even the poor. This encourages and provokes the disposition to go to law, by supplying it, almost universally, with the means. We have honest blacksmiths suing Banks for false imprisonment, and street-cleaners fine gentlemen for assaults and batteries, as the common occurrences of our Courts. Dear, too, as law is supposed to be in this country, it falls short of the expenses which are generally the concomitants of its benefits in England. The sums which, under the various denominations of fees and costs, fall upon the suitor by the time he gets into the House of Lords, when he carries his claims to that final stage of appellate authority, sometimes become enormous. A member of the House of Commons stated in his place, in 1810, that a bill of costs had been presented in a court of one of their colonial dominions *three fathoms* in length, and Sir William Scott himself gives us to understand, that there are "some suits famous in English juridical history for having outlived generations of suitors."

Under the names of Lee, Paul, Ryder, and Murray, and on an occasion so solemn as the answer of the English court to the Prussian memorial, was it formally said, that "in England the crown never interferes with the courts of justice."

True. And this is a legitimate boast. The holy sanctuary is never safe but when this is uniformly, sacredly, and unconditionally the case.

But he who has carefully surveyed the spirit of our own, in contrast with that of British jurisprudence, deceives himself if he supposes that it mounts no higher in a disdainful exemption from all extraneous impression. Taking the remark in its genuine meaning, we are called upon to *invert* it before we can arrive at the bold anomaly which sits upon the stern portals of American justice. Here the Courts are always in fact *interfering* with the government! Pass but an embargo law; pass but an act for the enlistment of minors; let the Legislature venture to abolish a Court or touch with only the pressure of a hair, the supposed rights of the citizen; and you will soon see what a storm will be raised about the ears of their supposed sovereign authority. Sometimes too, in its own way, it will rage terribly. The merchant, or the master, or the Judge, or the citizen, declares he is aggrieved. The lawyers meet. They ponder, they deliberate, they analyze, they investigate; finally they denounce. Or, it may be, that they denounce first, and do all the rest afterwards. Then approaches a scene of high expectation. We behold crowded lobbies, witness a palpitating array of judges, and barristers, and by-standers. The selected advocate rises; the motive to his duty is momentous; a crisis has arrived; posterity may be implicated in the decision. This is his exordium. And then—with a a scrutinizing severity of critical examination, tasking the deepest stores of acquired learning, and drawing upon the powers of an invention sharpened by patriotic or unworthy passions, he proceeds to lay open the incompatibility of the exercise of the delegated trust with the limits and injunctions of the constitutional charter. If he be successful, as sometimes happens, away goes the act of Congress or the act of Assembly, with all its virtues or all its blunders upon

its head. The representatives of the people complain; but what follows? They submit to the defeat; or, roused by the discomfiture, are invoked anew to review their work, supplying its oversights, filling up its defects, and making it proof, in short, against the well-directed, the bold, the ceaseless shocks of these terrible legal battering rams. The Constitution with Captain Hull in her, did not come down upon the Guerriere in a spirit of more daring and triumphant energy than the Philadelphia or New-York lawyers will sometimes do upon a statute that happens to run a little amiss!

We do not say these things in any political feeling. We merely say them because they are so. We refer to them as some of the haughty and intractable features of American jurisprudence, and as marking in this respect certainly an opposition to the genius of the British. Looking upon the good and the bad, we are inclined to approve and admire such occasional bursts of intellectual and forensick rebellion, as having their seat in the very soul of liberty, and as better assuagers of the public uneasiness than any which monarchies can resort to in seasons of alarm; the more especially, when co-operating with a press wholly exempt as to political matters, not only from previous, but (by the habits of the country) even all subsequent interposition. If they do sometimes embarrass, they may, in the long run, do good; and, considering the complicated counter-balancings under which the machine of our freedom, as it grows more vast and more magnificent, is to work, contribute their subsidiary aid to the safety, the happiness, and the grandeur of the republic. The same Providence which permits the lightening to rive the single oak, or blast the solitary traveller, freshens, through its instrumentality, the general atmosphere into purity and health.

The English jurisprudence in the parallel with this part

of ours, is, to say the least, tame, if it be not slavish. It is the soundest theory of their Constitution, that the Parliament can do whatever it pleases. Where any one of its acts speak an explicit language, the Courts dare not disobey. It operates as a sort of impressment upon the mind of the Judge, who must do his duty in carrying it into effect, whether he thinks it right or wrong, in consonance with the magna charta, or against it; while he consoles all judicial scruples with a declaration of his being reverently bound to believe, that the wisdom of the king, lords, and commons, could never ordain any thing unjust. There is no such courtesy or acquiescence here; no such compliments paid to infallibility. While the American legislator moulds his statute, a vigilant judicature fixes its eye upon him, and, moving in co-ordinate majesty, has ever yet warned him that he cannot pass over the markings of the compass and the square. We say, the British Constitution; but, in truth, it has none; or none, as we understand the term. It is, as the Abbe Montesquieu justly said in a late speech in the French Chamber of Deputies, "the offspring of circumstances, so linked together that no human combination could have foreseen or produced them."

The law itself, in this country, is, moreover, a science of great extent. We have an entire substratum of common law as the broad foundation upon which every thing else is built. It fills its thousand volumes like that of England, whose volumes in this respect are at the same time ours. But the extent of this law, its beginning, its termination; upon what subjects precisely it operates, and where it falls short; where the analogy of situation holds and where not, with the shades under which it may do the one or the other, (witness the great argument of Hamilton in Croswell's case, at Albany; that in the case of Blight's assignees, at Washington, so far as prerogative was implicated; with numerous other that might be referred to); these start questions upon

which the nicest discriminations of ingenuity and learning have been for a century at work. Often therefore the American lawyer has gone through but half his task when he has informed himself of what the common law is. The remaining, and perhaps the most difficult branch of inquiry is, whether it does or does not apply to this case? Notwithstanding the determination of the Supreme Court in the case of the United States vs. Hudson and Goodwin, it is still by no means certain that that tribunal would not sustain another and more full argument at this day on the question, in its nature more extensive and fundamental, whether or not the federal government draws to itself the common law of England, in criminal matters? When we speak of the great body of this system of law as a substratum, we mean of course, as applied to the individual states.

The statute law of England, during our provincial day, or anterior to it, is another great division liable to much the same sort of counter argument at the hands of those who have been charged with the heavy task, at which they still toil, of rearing the fabric of American jurisprudence. Next comes the prolific exuberance of our own statute law, superinducing its daily modifications upon the English code, and giving birth to original systems to meet the new exigencies of our incessant enterprise, our growing population, and the genius of all our other institutions. The statutes and the lawsuits to which steam-boats alone have given rise, within the last two or three years, would probably occupy several volumes. Those relative to turnpike roads and the contentions they have bred, taking all the states, would probably fill a dozen; and it would be difficult to limit the further illustrations we could give. Patents for new inventions would make an ample, not to say curious figure.

But the most fruitful theme upon which the abundant and commanding stores of intellect may be poured out, is

what we understand by our constitutional law, and which is nearly peculiar to the United States. The apportionment of power between the national and state constitutions, in the numerous channels into which it is made to flow, was originally a work surrounded on all sides with difficulties of equal novelty and magnitude. To draw with accuracy the line of separate authority between the conflicting charters, has often presented, and in all probability, will long continue to present complex problems, calling for the most artificial, untried, and elaborate investigations. These must not unfrequently borrow the lights of history as well as of law, of universal as well as of local jurisprudence; and by affecting the rights or touching the passions of entire communities, they often rouse the mind to the highest stretch of vigorous, and, in regard to the manifestation of its powers, of advantageous effort. This contrariety of jurisdiction between the federal and state governments, has been prettily compared by a celebrated elementary jurist of our country, to a line which "extends, like the Ecliptic, sometimes on one side and sometimes on the other of our political Equator." The judicial, the legislative, and the executive functions, which, under the two systems, in the numerous ranges of their exercise, are to be conciliated with an efficacious and harmonious whole, may well be supposed to open a wide field for the highest attributes of the understanding, where original strength must unite with the most complete state of improvement as to every kindred source of acquired knowledge. If we were to advert to a few instances occurring to us as lending countenance to the spirit of these remarks, they would be, such as the great case of the suability of a state, that of the British debts, that of the carriage tax, Colonel Burr's trial, M'Ilvaine's Lessee vs. Coxe, Vanhorne's vs. Dorance, Talbot vs. Janson, the Yazoo case, and the motion for the mandamus against the Secretary of State.

Moreover, while we are led into an allusion to such cases

as these, we will take upon us to say, without resorting to numerous others which the state as well as the national tribunals afford, that they are characterized by as universal and as splendid diplays of appropriate genius and learning, both from the bench and bar, as any recorded judicial decisions with which we are acquainted, will be found to boast. It is true, they are not yet much known or acknowledged abroad. But that is, because the day of our being treated as provincial is hardly quite worn out. It is far from impossible, that we may lately have been hastening the period of its obliteration, and that having become somewhat more known in our mere existence as a nation through our Jacksons, our Browns, our Biddles, our Blakeleys, and our Decaturs, we may be making more encouraging approximations than we could otherwise have flattered ourselves with the hope of doing, towards the more diffusive fame of our Jays, our Ellsworths, and our Marshalls. We are not much in fear of falling under imputations we should wish to avoid, when we imagine, that not the Literary Property case, nor that of Perrin and Blake, nor the opinion on Wilkes's Outlawry, nor the case of the Gleaners, nor that of the Commendams, nor the Somerset cause, nor the great Douglas' cause, nor any of the other prominent causes which adorn the law books of England, have earned fairer honors to the English bar and bench than the causes adverted to do already reflect upon the American.

It is not a little remarkable that the English law books or decisions scarcely ever notice, in any way, the legislative or judicial regulations that emanate from this side of the water. While they dwell, throughout whole pages, on the maritme institutions or decrees of Sweden, or Denmark, or Portugal, they spend no passing notice on those of a country now so largely transcending, and that for years, has so far surpassed these and all the other smaller states of Europe, in maritime extent and riches. Professor Browne, in his learned Lectures upon Civil and Admiralty Law, is an

exception to this remark. The reader of that work will perceive that he generally reviews, in connexion with those of the European states, the maritime ordinances and statutes of this country.

Lastly, in the structure of our judicature, we have a multitude of different sorts of Courts. We have courts of common law and courts of chancery, admiralty and maritime courts, courts civil and courts criminal, sittings at nisi prius and full terms in bank, registers' courts, orphans' courts, escheators' courts, justices' courts, with the many gradations of some of them, and with others that might be made to swell the catalogue. It may be said, that this is nothing more than the judicial polity of other countries, particularly Britain, is liable; that if you will begin at the Piepoudre and go up to the Peers in Parliament, you will run through, under some modification or other, as long an enumeration. This may be true. But the difference is, that the profession here is not subdivided, in any of the states, in the ways that it is in England; and the American lawyer is called upon, at one period or other of his life, to understand the constitution of each of these forums; to be familar at least with their principles, if not with their forms, as he passes on, through the usual stages, to the head of his profession.

It may be supposed that great labor is necessary to master such a range of knowledge. And such, undoubtedly is the case. The men among us who reach the vantage ground of the science, who become as well the safe counsellors as the eloquent advocates, are only those who in their early day explore its ways with repetitions of intense, and, through all its dreadful discouragements to the young mind, unwearied assiduity; and who are afterwards content to devote their days to business and their nights to study. Sparing, indeed must be their relaxations. If they stop for repose or turn aside for indulgence, like the son of Abensina in the affecting oriental tale, they will be reminded, when

perhaps it is too late, of the impossibility of uniting the gratifications of ease with the rewards of diligence. The true enjoyments to be gathered from the rugged path of the profession, and, happily, they are at once animating and refined, are those reflections which come sweetly over the mind, under the consciousness of duty successfully performed, and of eminence honorably achieved.

While the law with us is so copious, we are still willing to believe, that it has all the essential characteristics of a good code. That its comprehensiveness is the unavoidable result of our wants and the glorious evidence of our freedom. That its occasional darkness, supposed or real, is nothing more than belongs to all free codes in a greater or less degree, and is generally to be dispelled by the penetrating rays of a comprehensive knowledge. That above all, if in the unravelling and adjustment of complicated concerns, it may sometimes at first sight seem itself complicated, it never fails to throw a broad effulgence upon all the fundamental securities of the liberty and property of the citizen.

The English jurisprudence, with all it has to boast, was our first inheritance. But we hope it will not be thought we are presumptuous in supposing, that we have but secured to ourselves more signally its advantages, by shaking off, more freely than is done there, the shackles fixed upon it in early and rude periods. In making this remark, we think we shall largely carry with us the concurrence of informed and liberal readers, when it is applied to the whole criminal branch. When such sober minded and profound names as Hale, Blackstone, Romilly, and M'Intosh will agree, at epochs distant from each other, in condemning the deplorable severity of the English penal code, it may surely be permitted to others to join in the grateful opinion. Scarcely indeed does a year now pass over in which modern Parliaments are not paying homage to this opinion, by lopping off

or mitigating some of the harsh and cruel features ;—a work in which they have long ago been anticipated by the intelligent and humane wisdom of our own legislators. We still think, making all allowances for the exigencies of the two countries, that they have a great deal to do before they get to the point we have reached in this happy race of melioration. It cannot be said of us, as it is truly said of the English in reference to the numerous and small offences for which they punish capitally, that while, for centuries, every thing else had become dearer in its price among them, the life of man was continually allowed to grow cheaper.

The systems of law recently compiled for the French nation, if we will but abstract the political associations that go along with them, will challenge an almost universal judgment in their favor for the lights of ancient and modern wisdom so extensively intermingled in their formation. The imperialist bows to them from the auspices under which they were compiled ; and Louis the Eighteenth, in his proclamation of January, 1814, speaks of them as containing, "under other modifications and names, the wisdom of all the ancient laws of France." If they do this they also do more. They embody much of the wisdom which the further experience of more recent times has evolved. It is gratifying to think, that the one which passes under the penal code of the French empire, is marked by many of the improvements familiar to the American states. To the Pennsylvanian it must be particularly so, when he finds that the law of homicide has been divided into the same degrees, and is couched in nearly the same terms, with the statute of that state upon this subject passed more than twenty years ago.*

* One of these codes, the commercial, has been translated into English by Mr. Du Ponceau of Philadelphia, who has added notes with his usual learning and ability. Mr. Rodman of New-York has translated the same code. We cannot help thinking that the latter gentleman would render an acceptable service to the public, by executing the

Leaving the criminal branch, and bringing into view, the entire scope of jurisprudence in the two countries, we are disposed to place ours at the highest pitch in the comparison. If the advantage even be with us, we should say, in searching for the cause, that it is owing to our having gotten rid, in the greatest number of instances, of that feudal turn, and of those perplexed and cumbrous forms of the Norman day, which so long disfigured the admirable system upon which, by force or by artifice, they were incorporated. These, nothing but a prying eye, coupled with a resolution bold enough to lift up its hand against gray hairs, can ever effectually root out. "Time," says Lord Bacon, "is the greatest innovator; and if Time is always altering things for the worse, and Wisdom and Counsel do not sometimes alter them for the better, what will be the end thereof?" The English are rooting out these abuses; but perhaps, from a greater dread of touching the hoar that encircles the old trunk, seem more backward than we at tearing away the poisonous shoots which, at the subjugation of the true proprietors of the soil, were suffered to grow up rank around it. In the law of ejectment and entails; in the order of paying debts; in the law of descent, independent of the principle of primogeniture; in the liability of real estate to the demands of the creditor; in the law of executors and wills, with other points that might be enumerated, did not the nature of this discussion, which aims at nothing but drawing outlines, forbid, we think the liberal and less manacled judgment of the American states has outstripped the judicial wisdom of England in wholesome amendments. The luminous mind of Lord Mansfield did wonders towards many and obvious prunings. But much more remains to be accomplished; and perhaps his efforts, successful as they

plan he has intimated, of translating the whole of them, after the manner he has done the first. He has shown himself amply equal to the task; not as a translator merely, but as an ingenious anotator also.

may have been, are in theory too bold for precedent even in his own meridian. Left to himself by the sluggishness of Parliament, he was forced to substitute a sort of judicial, for what would have been performed if not more efficaciously, more appropriately, by parliamentary legislation.

If the English would institute some legislative inquest, or set on foot some national commission, only once in a century, for the entire revisal of their admirable code, could it be, that in an enlightened age the father should never be able to succeed immediately as heir to the real estate of the son, or that, in the principal courts of the kingdom, land devised or descending to the heir, should not be liable to the simple contract debts of the ancestor or devisor, although the money was laid out in purchasing the very land? Surely common sense would too powerfully have pleaded for the abolition of the effect, after so long an extinction of the feudal cause. But these commissions of review, although sactioned by the example of other great and enlightened nations both of ancient and modern times, an example which some of the American states have copied, have never been gone into by the English. While the rigors or absurdities of the Norman tyranny were yoked upon them in baneful heaps, during a single epoch, they seem, through an overstrained caution, little inclined to part with them, except one by one, in the tedious lapse of ages.

Not only has the nation been backward at any thing in the shape of a formal revisal of their code. It has been remarked also, as a fact somewhat curious, that, while the free states of Italy, in the 13th century, had their Consolato del Mare, of which they acknowledged their authority; Barcelona her Ordinances; Wisbuy and the Hanse-Towns, respectively, their Marine Codes; France, under Louis the Fourteenth, the same; and most other nations highly commercial, theirs,—Britain, the greatest naval power in the world, should never yet have any cemented naval or mari-

time collection compiled or published under the authority of the government. Different causes might be assigned, or different speculations hazarded, in accounting for this fact. Perhaps it has been the effect of accident; perhaps she has chosen to rely upon the compilations of other nations in connexion with her own statutory regulations and those of the crown. Or, possibly, the motive may have been generated by the vast and advantageous peculiarities of her political condition; and it may have been thought best not to confine within the restrictions or the certainties of a specific and stationary code, the rules of a commercial and warlike marine that has been so fast transcending, and that was so soon likely to draw entirely within the vortex of its own influence or control, that of every other country. Nothing is so apt as power, to flow over its bounds; and where its enterprizes are destined, in the plans or reveries of long-sighted and bold statesmen, to take a wide range it would be safest certainly, as with the press, to lay it under no previous restraints. These are but conjectures.

It is a subject of remark, scarcely less worthy to be alluded to, that this nation, so distinguished by great names in almost every branch of science, literature, and the arts, should yet be so barren in writers upon the public law. Few of her lawyers have soared beyond the fame of local learning. Of how little account, in the eyes of continental Europe, are her mere municipal jurists, may be gathered, in some slight degree—unless we look only at the humor of the idea—from Bynkershock's well known manner of speaking of the most valuable and profound of them all, my Lord Coke. He calls him, *Cocus quidam,—a certain Coke!*

(*To be continued.*)

THE SPEECH OF LORD ERSKINE

In the House of Lords in England,

ON CRUELTY TO ANIMALS.

My Lords,

I am now to propose to the humane consideration of the House, a subject which has long occupied my attention, and which I own to your lordships is very near my heart.

It would be a painful and disgusting detail, were I to endeavour to bring before you the almost innumerable instances of cruelty to animals, which are daily occurring in this country, and which, unfortunately, only gather strength by any efforts of humanity in individuals to repress them, without the aid of the law.

These unmanly and disgusting outrages are most frequently perpetrated by the basest and most worthless; incapable, for the most part, of any reproof which can reach the mind, and who know no more of the law, than that it suffers them to indulge their savage dispositions with impunity.

Nothing is more notorious, than that it is not only useless, but dangerous, to poor suffering animals, to reprove their oppressors, or to threaten them with punishment. The general answer, with the addition of bitter oaths and increased cruelty, is, "What is that to you."

If the offender be a servant, he curses you, and asks if you are his master? And if he be the master himself, he tells you that the animal is his own. Every one of your lordships must have witnessed scenes like this. A noble Duke, whom I do not see in his place, told me only two days ago, that he had lately received this very answer. The validity of this most impudent and stupid defence, arises from

that defect in the law which I seek to remedy. Animals are considered *as property only*—to destroy or to abuse them, from malice to the proprietor, or with an intention injurious to his interest in them, is criminal; *but the animals themselves are without protection*—the law regards them not *substantively*—they have no rights!

I will not stop to examine, whether public cruelty to animals, may not be, under many circumstances, an indictable offence: I think it is, and if it be, it is so much the better for the argument I am about to submit to your lordships. But if even this were clearly so, it would fall very short of the principle which I mean anxiously and earnestly to invite the House to adopt. I am to ask your lordships, in the name of that God who gave to man his dominion over the lower world, to acknowledge and recognize that dominion to be a *moral trust*. It is a proposition which no man living can deny, without denying the whole foundation of our duties, and every thing the bill proposes will be found to be absolutely corollary to its establishment; except, indeed, from circumstances inevitable, the enacting part will fall short of that which the indisputable principle of the preamble would warrant.

Nothing, my lords, is, in my opinion, more interesting, than to contemplate the helpless condition of man, with all his godlike faculties, when stripped of the aid which he receives from the numerous classes of inferior beings, whose qualities, and powers, and instincts, are admirably and wonderfully constructed for his use. If, in the examination of these qualities, powers and instincts, we could discover nothing else but that admirable and wonderful construction for man's assistance; if we found no organs in the animals for their own gratification and happiness—no sensibility to pain or pleasure—no grateful sense of kindness, nor suffering from neglect or injury—no senses analogous, though inferior to our own: If we discovered, in short, nothing but

mere animated matter, obviously and exclusively subservient to human purposes, it would be difficult to maintain that the dominion over them was a trust; in any other sense, at least, than to make the best for ourselves of the property in them which Providence had given us. But, my lords, it calls for no deep or extensive skill in natural history, to know that the very reverse of this is the case, and that God is the benevolent aud impartial Author of all that he has created. For every animal which comes into contact with man, and whose powers, and qualities, and instincts. are obviously constructed for his use, Nature has taken the same care to provide, and as carefully and as bountifully as for man himself, organs and feelings for its own enjoyment and happiness. * Almost every sense bestowed upon man, is equally bestowed upon them. Seeing, hearing, feeling, thinking; the sense of pain and pleasure, the passions of love and anger; sensibility to kindness and pangs from unkindness and neglect; are inseparable characteristics of their natures, as much as our own. Add to this my lords, that the justest and tenderest consideration of this benevolent system of nature, is not only consistent with the fullest dominion of man over the animal world, but establishes and improves it. In this, as in every thing else, the whole moral system is inculcated by the pursuit of our own happiness. In this, as in all other things, our duties and our interests are inseparable. I defy any man to point out any one abuse of a brute which is property, by its owner, which is not directly against his own interest. Is it possible then, my lords, to contemplate this wonderful arrangement, and to doubt, for a single moment, that our dominion over animals is a trust? They are created indeed for our use, but not for our abuse: their freedom and enjoyments, when they cease to be consistent with our freedom and enjoyments, can be no part of their natures; but whilst they are consistent, their rights, subservient as they are, ought to be as sacred as our own. And although certainly, my lords, there can be no law for man in

that respect; but such as he makes for himself, yet I cannot conceive any thing more sublime or interesting, more grateful to heaven or beneficial to the world, than to see such a spontaneous restraint imposed by man upon himself.

This subject is most happily treated by one of the best poets in our language.

Mr. Cowper, in his Task, says :—

——————"The sum is this—
If man's convenience, health, or safety
Interfere, his rights and claims are paramount,
And must extinguish theirs,—else they are all."

Every other branch of our duties, when subject to frequent violation, has been recognized and inculcated by our laws, and the breaches of them repressed by punishments; and why not in this, where our duties are so important, so universally extended, and the breaches of them so frequent and so abominable?

But in what I am proposing to your lordships, disinterested virtue, as in all other cases, will have its own certain reward. The humanity you shall extend to the lower creation will come abundantly round in its consequences to the whole human race. The moral sense which this law will awaken and inculcate, cannot but have a most powerful effect upon upon our feelings and sympathies for one another. The violences and outrages committed by the lower orders of the people, are offences more owing to want of thought and reflection, than to any malignant principle; and whatever, therefore, sets them a thinking upon the duties of humanity, more especially where they have no rivalries nor resentments, and where there is a peculiar generosity in forbearance and compassion, has an evident tendency to soften their natures, and to moderate their passions, in their dealings with one another.

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The effect of laws which promulgate a sound moral principle, is incalculable. I have traced it in a thousand instances, and it is impossible to describe its value.

My lords, it was in consequence of these simple views, and on these indisputable principles, that I have framed the preamble of the very short bill which I now present for a second reading to the House. I might, without preamble or preface, have proposed at once to enact, if not to declare wilful and wanton cruelty to the animals comprehended in it to be a misdemeanor, looking, as I now do, to the Commons to enforce the sanction of the law by pecuniary penalties. But then the grand efficacious principle would have been obscured; which, if fortunately adopted by your lordships, will enact this law as a spontaneous rule in the mind of every man who reads it—which will make every human bosom a sanctuary against cruelty—which will extend the influence of a British statute beyond even the vast bounds of British jurisdiction; and consecrate, perhaps, in all ages, and in all nations, that just and eternal principle, which binds the whole living world in one harmonious chain, under the dominion of enlightened man, the lord and governor of all.

I will now read to your lordships, the preamble as I have framed it.

"Whereas it has pleased Almighty God to subdue to the dominion, use and comfort of man, the strength and faculties of many useful animals. and to provide others for his food; and whereas the abuse of that dominion, by cruel and oppressive treatment of such animals, is not only highly unjust and immoral, but most pernicious in its example, having an evident tendency to harden the heart against the natural feelings of humanity."

This preamble may be objected to as too solemn and unusual in its language; but it must be recollected, that the subject of the bill is most peculiar and unusual; and it being

impossible to give practical effect to the principle in its fullest extent, it became the more necessary, in creating a duty of imperfect obligation, where legal restraints would be inefficacious or impossible, to employ language calculated to make the deepest impression upon the human mind, so as to produce, perhaps, more than the effect of law, where the ordinary sanctions of law were wanting.

It may be now asked, my lords, why, if the principle of the bill be justly unfolded by this preamble, the enacting part falls so very short of protecting the whole animal world, or at all events those parts of it which come within the reach of man, and which may be subject to abuse. To that I answer—It does protect them to a certain degree, by the very principle which I have been submitting to your consideration, and to protect them further, would be found to be attended with insurmountable difficulties, and the whole bill might be wrecked by an impracticable effort to extend it. But I shall be happy to follow others in the attempt. The bill, however, as it regards all animals, creates a duty of imperfect obligation; and your lordships are very well aware, that there are very many and most manifest and important moral duties, the breaches of which human laws cannot practically deal with, and this I fear will be found to be the case in the subject now under consideration.

Animals living in a state of nature, would soon overrun the earth, and eat up and consume all the sustenance of man, if not kept down by the ordinary pursuits and destruction of them, by the only means in which they can be kept down and destroyed; and it is remarkable, that other animals have been formed by Nature, with most manifest instincts to assist us in this necessary exercise of dominion; and indeed, without the act of man, these animals would themselves prey upon one another, and thus be visited by death, the inevitable lot of all created things, in more painful and frightful shapes. They have, besides, no knowledge of the

future, and their end, when appropriated fitly for our food, is without prolonged suffering. This economy of Providence, as it regards animals, which from age to age have lived in an unreclaimed state, devoted to the use of man and of each other, may serve to reconcile the mind to that mysterious state of things in the present fallen and imperfect condition of the world.

This state of wild animals is further strikingly illustrated, by the view of such of them as have been spared from the human huntsmen, or the more numerous tribes of animals of prey. They are swept away by the elements in hard winters, retiring as most of them do, to a solitary, protracted and painful death.

Old age, my lords, even amongst men, is but a rare blessing; amongst such brutes, perhaps, never. Old age can only be supported in comfort by that aid and tenderness from others, arising from the consciousness of those ties of nature, which it has not pleased the Divine Providence to dispense to the lower world; but which, as the greatest of all blessings, it has communicated to man. When the brutes have fulfilled their duties to their young for their protection they know them no more, and die of old age, or cold, or hunger, in view of one another, without sympathy, or mutual assistance, or comfort.

It is the same, to a certain extent, with regard to those reclaimed animals devoted to man's use for food, whose faculties, as far as our observation is capable of a just comparison, approach nearer to human reason. The old age even of such animals, for the reasons adverted to, would seldom be satisfactory. When they pass, therefore, from life to death, in a manner which gives them no foretaste of their doom, and consequently no sense of pain or sorrow in the road to it, the ways of God are justified to man.

The bill, therefore, as it regards wild animals, could not easily have been framed for practicable operation, except by sanctioning as it does the principle of the preamble, which will, I trust, insensibly extend its influence to the protection of every thing that has life; by bringing habitually into the view of the mind, the duties of imperfect obligation which it inculcates; and with regard to animals bred by man, or reclaimed for food, it will directly protect them against the cruelties which are generally committed on them, viz. the unmercifully driving them and beating them on their passage to fairs and markets, and against unnecessary sufferings in the hour of death.

As to the tendency of barbarous sports of any kind or description whatsoever, to nourish the national characteristic of manliness and courage, the only shadow of argument I ever heard upon such occasions, all I can say is this: that from the mercenary battles of the lowest of beasts (human boxers) up to those of the highest and noblest that are tormented by man for his degrading pastime, I enter this public protest against it. I never knew a man remarkable for heroic bravery, whose very aspect was not lighted up by gentleness and humanity; nor a kill-him and eat-him countenance, that did not cover the heart of a bully or poltroon.

As to other reclaimed animals, which are not devoted to our use as food, but which are most wonderfully organized to assist man in the cultivation of the earth, and by their superior activity and strength, to lessen his labor in the whole circle of his concerns, different protections become necessary, and they are also provided for by the bill, and without the loss or abridgment of any one right of property in such animals. On the contrary, all its provisions protect them, as property, from the abuses of those to whose care and government their owners are obliged to commit them. They also reach the owners themselves, if, from an inordinate desire

of gain, or other selfiish considerations, they *abuse* the animals, their property in which is limited to the *use*.

It would be wasting your lordships' time, if I were to enumerate the probable cases which this part of the bill will comprehend. It is well observed by an Italian philosopher, "that no man desires to hear what he has already seen." Your lordships cannot have walked the streets, or travelled on the roads, without being perfectly masters of this part of the subject. You cannot but have been almost daily witnesses to most disgusting cruelties practised upon beasts of carriage and of burthen, by the violence and brutality of their drivers. To distinguish such brutality and criminal violence, from severe, but, sometimes, necessary discipline, may at first view appear difficult, and on that account a serious objection to the bill,—but when I come to that part of the subject, I pledge myself to show that it involves no difficulty whatsoever. But there are other abuses far more frequent, which will require a more particular consideration. For one act of cruelty in servants, there are a hundred in the owners of beasts of labor and burthen: sometimes committed by the owners alone, from a scandalous desire of gain, and sometimes in a most unworthy partnership with their superiors, who are equally guilty, with no gain at all, nor for any motive that it would not be disgraceful to acknowledge. I allude, my lord, to our unhappy post-horses. It is not my wish, my lords, to be a fanciful reformer of the world, nor to exact that the manners and customs of a highly civilized nation should be brought to the standard of simplicity and virtue, if indeed such a standard ever existed upon earth. I do not seek to appoint inspectors to examine the books of inkeepers, so as to punish any excess in the number of their stages, as you do an excess of outside passengers on the roofs of coaches. I know there are very many cases (which could not be brought strictly within the scope of necessities) where these poor animals must grievously suffer, yet where

no law can properly reach to protect them. The demands, though not imminent, of human health, and even of convenience; the occasional exigencies of commerce; the exercise of franchises; and many other cases which must occur to every body, would furnish obvious exceptions without violation of the principle, and which every court and magistrate would know how to distinguish. But the bill, if properly executed, would expose innkeepers to a reasonable punishment, who will probably devote an innocent annimal to extreme misery, if not to death itself, by a manifest and outrageous excess of labor, rather than disoblige a mere traveller, engaged in no extraordinary business, lest in future he should go to the inn opposite. When the law shall give a rule for both sides of the way, this most infamous competition will be at an end.

For my own part, my lords, I can say with the greatest sincerity to your lordships, that nothing has ever excited in my mind greater disgust, than to observe what all of us are obliged to see every day in our lives, horses panting—what do I say? literally dying under the scourge! when, on looking into the chaises, we see them carrying to and from London, men and women, to whom, or to others, it can be of no possible signification whether they arrive one day sooner or later, and sometimes indeed whether they ever arrive at all. More than half the post-horses that die from abuse in harness, are killed by people, who, but for the mischief I am complaining of, would fall into the class described by Mr. Sterne, of simple or harmless travellers, galloping over our roads for neither good nor evil, but to fill up the dreary blank in unoccupied life. I can see no reason why all such travellers should not endeavor to overcome the *ennui* of their lives, without killing poor animals, more innocent and more useful than themselves. To speak gravely, my lords, I maintain, that human idleness ought not to be permitted, by the laws of enlightened man, to tax for nothing, beyond

the powers which God has given them, the animals which benevolence has created for our assistance.

But another abuse exists, not less frequent and much more shocking, because committed under the deliberate calculation of intolerable avarice. I allude to the practice of buying up horses when past their strength from old age or disease, upon the computation (I mean to speak literally) of how many days' torture and oppression they are capable of living under, so as to return a profit with the addition of the flesh and skin, when brought to one of the numerous houses appropriated for the slaughter of horses. If this practice only extended to carrying on the fair work of horses to the very latest period of labor, instead of destroying them when old or disabled, I should approve, rather than condemn it. But it is most notorious, that, with the value of such animals, all care of them is generally at an end, and you see them (I speak literally, and of a systematic abuse) sinking and dying under loads, which no man living would have set the same horse to, when in the meridian of his strength and youth.

This horrid abuse, my lords, which appears at first view to be incapable of aggravation, is nevertheless most shockingly aggravated, when the period arrives at which one would think cruelty necessarily must cease, when exhausted nature is ready to bestow the deliverance of death. But even then a new and most atrocious system of torture commences, of which, my lords, I could myself be a witness in your committee, as it was proved to my perfect satisfaction, and that of my friend Mr. Jekyll, upon the information of a worthy magistrate, who called our attention to the abuse. But, perhaps, my lords, I shall better describe it, as it will at the same time afford an additional proof of these hideous practices, and of their existence at this hour, by reading a letter which I received but two days ago, the facts of which I am ready to bring in proof before your lordships.

Here Lord Erskine read an extract from a letter, which stated—

"A very general practice of buying up horses still alive, but not capable of being even further abused by any kind of labor. These horses, it appeared, were carried in great numbers to slaughter houses, but not killed at once for their flesh and skins, but left without sustenance, and literally starved to death, that the market might be gradually fed;—the poor animals, in the mean time, being reduced to eat their own dung, and frequently gnawing one another's manes in the agonies of hunger."

Can there be a doubt, my lords, that all such shocking practices should be considered and punished as misdemeanors? Here again it may be said that the bill, in this part of it, will invest magistrates with a novel and dangerous discretion. I am not yet arrived at that part of the case, though I am fast approaching it; when I do, I pledge myself without fear, to maintain the contrary, to the satisfaction of every one of your lordships, more especially including the learned lords of the House. No less frequent and wicked an abuse, is the manifest overloading of carriages and animals of burthen, particularly asses; and as far as this poor animal is unjustly considered an emblem of stupidity, the owners who thus abuse him are the greater asses of the two. The same may be said of keeping animals without adequate food to support their strength, or even their existence. This frequently happens to beasts impounded for trespasses. I have had complaints of this abuse from all parts of the country. The notice to the owner is seldom served, and thus the poor innocent animal is left to starve in the pound. As far as an animal is considered merely as property, this may be all very well, and the owner must find him out at his peril. But when the animal is looked to upon the principle of this bill, the impounder is to feed him, and charge it to the owner as a part of the damages.

Only one other offence remains which I think it necessary to advert to, which it is difficult sufficiently to expose and stigmatize, from the impudence with which it is every day committed; as if the perpetrators of this kind of wickedness were engaged in something extremely entertaining and innocent, if not meritorious. I allude to those extravagant bets for trying the strength and endurance of horses; not those animating races, properly so called, which the horse really enjoys, and which, though undoubtedly attended with collateral evils, has tended greatly to improve the breed of that noble and useful animal. The contests which I consider as wilful and wanton cruelty, are of a different kind: I maintain, that no man, without being guilty of that great crime, can put it upon the uncertain and mercenary die, whether in races against time—no—not properly so called, but rather journies of great distances within limited periods, the exertions shall very far exceed the ordinary power which nature has bestowed on the unhappy creature, thus wickedly and inhumanly perverted from the benevolent purposes of their existence.

All the observations I have just been making to your lordships, undoubtedly apply to the maliciously tormenting any animals whatsoever, more especially animals which we have voluntarily reclaimed and domesticated; and yet I fairly own to your lordships, that as the bill was originally drawn, and as it stood until a few days ago, it would not have reached many shameful and degrading practices. The truth is, that I was afraid to run too rapidly and directly against prejudices. But, on conversing with very enlightened and learned men, I took courage in my own original intention, and introduced the concluding clause, which comprehended the wickedly and wantonly tormenting any reclaimed animal; the effect of which in practice I will explain hereafter, when I come to show the practicability of executing the law without trespassing upon the just rights and

privileges of mankind. If your lordships, however, shall ultimately differ from me in this part of the subject, you can strike out this clause in the committee. I have purposely kept it quite distinct and separate from the rest of the bill, as I originally framed it, being resolved to carry an easy sail at first, for fear of oversetting my vessel, in a new and dangerous navigation.

I now come, my lords, to the second part of the case, which will occupy but a small portion of your lordships' time, on which I am afraid I have trespassed but too long already.

Supposing, now, your lordships desirous of subscribing to the principles I have opened to you, and to feel the propriety of endeavouring to prevent, as far as possible, the inhuman cruelties practised upon animals, so general and so notorious, as to render a more particular statement of them as unnecessary as it would have been disgusting: The main question will then arise, viz. how the jurisdiction erected by this bill, if it shall pass into a law, may be executed by courts and magistrates, without investing them with a new and arbitrary discretion.

My lords, I feel the great importance of this consideration, and I have no desire to shrink from it; on the contrary, I invite your lordships to the closest investigation of it, and for that purpose, I will myself anticipate every possible objection of that description, and give your lordships, in a very few words, the most decisive answers to them.

How, it may be first asked, are magistrates to distinguish between the justifiable labours of the animal, which, from man's necessities, are often most fatiguing, and apparently excessive, and that real excess which the bill seeks to punish as wilful, wicked, and wanton cruelty? How are they to distinguish between the blows which are necessary,

when beasts of labour are lazy or refractory, or oven blows of sudden passion and temper, from deliberate, cold-blooded ferocious cruelty, which we see practised every day we live, and which has a tendency, as the preamble recites, to harden the heart against all the impulses of humanity?

How, in the same manner, are they to distinguish between the fatigues and sufferings of beasts for slaughter, in their melancholy journies to death in our markets, from unnecessary, and therefore barbarous, aggravations of them?

Here, my lords, I am at home:—here I know my course so completely, that I can scarcely err. I am no speculator upon the effect of the law which I propose to you, as the wisest legislators must often be, who are not practically acquainted with the administration of justice. Having passed my life in our courts of law when filled with the greatest judges and with the ablest advocates, who from time to time have since added to their number, I know with the utmost precision, the effect of it in practice, and I pledge myself to your lordships, that the execution of the bill, if it passes into law, will be found to be most simple and easy; raising up no new principles of law, and giving to courts no larger discretion nor more difficult subjects for judgment, than they are in the constant course of exercising.

First of all, my lords, the law I propose to your lordships, is not likely to be attended with abuse in prosecution; a very great, but I am afraid an incurable evil in the penal code. I stimulate no mercenary informers, which I admit often to be necessary to give effect to criminal justice; I place the lower creation entirely on the genuine, unbought sympathies of man.

No one is likely to prosecute by indictment, or to carry a person before a magistrate, without probable, or rather without obvious and flagrant cause, when he can derive no personal benefit from the prosecution, nor carry it on with-

out trouble and expence. The law is, therefore, more open to the charge of inefficacy, than of vexation.

It can indeed have no operation, except when compassionate men (and I trust they will become more numerous from the moral sense which this bill is calculated to awaken) shall set the law in motion against manifest and disgusting offenders, to deliver themselves from the pain and horror which the immediate views of wilful and wanton cruelty is capable of exciting, or is rather sure to excite, in a generous nature.

What possible difficulty then can be imposed upon the magistrate, who has only to judge upon hearing, from his own humane feelings, what such disinterested informers have judged of from having seen and felt. The task is surely most easy, and by no means novel. Indeed, the whole administration of law, in many analogous cases, consists in nothing else but in discriminations, generally more difficult in cases of personal wrongs.

Cruelty to an apprentice, by beating, or over labour, judged of daily upon the very principle which this bill will bring into action in the case of an oppressed animal.

To distinguish the severest discipline, to command obedience, and to enforce activity in such dependants, from brutal ferocity and cruelty, never yet puzzled a judge or a jury, never at least in my very long experience; and when want of sustenance is the complaint, the most culpable overfrugality is never confounded with a wicked and malicious privation of food.

The same distinctions occur frequently upon the plea of moderate chastisement, when any other servant complains of his master, or when it becomes necessary to measure the degree of violence, which is justifiable in repelling violence, or in the preservation of rights.

In the same manner, the damage from a frivolous assault or of a battery, the effect of provocation or sudden temper, is daily distinguished in our courts, from a severe and cold-blooded outrage. A hasty word, which just contains matter that is actionable, is, in the same manner, distinguished in a moment from malignant and dangerous slander. Mistakes in the extent of authority, which happen every day in the discharge of the complicated duties of the magistracy are never confounded for a moment, even when they have entrenched severely upon personal liberty, with an arbitrary and tyrannical imprisonment. Unguarded or slight trespasses upon property, real or personal, are in the same way the daily subjects of distinction from malicious deprivations of rights, or serious interruptions of their enjoyment.

Similar, or rather nicer distinctions, are occurring daily in our courts—when libel or no libel is the question. A line must be drawn between injurious calumny, and fair, though, perhaps, unpleasant animadversion; but plain good sense, without legal subtlety, is sure to settle it with justice. So every man may enjoy what is his own, but not to the injury of his neighbor. What is an injury, or what is only a loss, without being injurious, is the question in all cases of nuisance, and they are satisfactorily settled by the common understandings and feelings of men.

My lords, there would be no end of these analogies, if I were to pursue them, I might bring my whole professional life for near thirty years, in review before your lordships.

I appeal to the learned lords of the House, whether these distinctions are not of daily occurrence. I appeal to my noble and learned friend on the woolsack, whether, when he sat as Chief-Justice of the Common Pleas, he found any difficulty in these distinctions. I appeal to my noble and

learned friend who sits just by him, whose useful and valuable life is wholly occupied amidst these questions, whether they are doubtful and dangerous in the decision, and whether they are not precisely in point with the difficulties which I have anticipated, or with any others which opponents to the bill can possibly anticipate. I make a similar appeal to another noble and learned friend, who has filled the highest situation. I do not see him at this moment in his place; but to him also I might make the same fearless application.

I cannot therefore conceive a case on which a magistrate would be exposed to any difficulty under this bill, if it should pass into a law.

The cruelties which I have already adverted to, are either committed by owners, or by servants, charged with the care and government of horses and other cttale. If the owner unmercifully directs them to be driven to the most unreasonable distances, or with burthens manifestly beyond their powers; if he buys them up when past the age of strength, not for a use correspondent to their condition, but upon the barbarous and wicked computation of how long they can be tortured to profit. In neither of these cases can the cruelty be imputed to the servant whom you meet upon the road, struggling to perform the unjust commands of his employer. The master is the obvious culprit—respondent superior—the spectators and the servant are the witnesses—and these are the cases where an indictment would operate as a most useful example, without oppression, to those who thus offend systematically against every principle of humanity and justice.

On the other hand, when no cruel commands are given to the servant, but his own malice offends at once against his master and the unhappy animal which he wickedly abuses, he of course is alone responsible; and these are the cases in which a summary jurisdiction would be most generally re-

sorted to, as more favorable at once to the disinterested informer and to the offender, who would be thus punished with a small penalty, and be delivered from an expensive prosecution.

The other House of Parliament will no doubt accomplish this in the further progress of the biil.

But in neither of these cases, which comprehend, indeed, every abuse which the bill extends to, is there any kind of danger that it will work oppression, or produce uncertainty in decision.

A man cannot, if an owner, be the subject of an indictment, because he may have been less considerate and merciful than he ought to be; nor, if a servant, for an unreasonable blow of temper upon an unmanageable charge. No, my lords! Every indictment or information before a magistrate must charge the offence to be committed maliciously, and with wanton cruelty, and the proof must correspond with the charge. This bill makes no act whatever a misdemeanor that does not plainly indicate to the Court or Magistrate a malicious and wicked intent; but this generality is so far from generating uncertainty, that I appeal to every member in our great profession, whether, on the contrary, it is not in favor of the accused, and analagous to our most merciful principles of criminal justice? So far from involving the magistrate in doubtful discriminations, he must be himself shocked and disgusted before he begins to exercise his authority over another. He must find malicious cruelty; and what that is can never be matter of uncertainty or doubt, because Nature has erected a standard in the human heart, by which it may be surely ascertained.

This consideration surely removes every difficulty from the last clause, which protects from wilful, malicious, and wanton cruelty, all reclaimed animals. Whatever may be

the creatures which, by your own voluntary act, you choose to take from the wilds which nature has allotted to them, you must be supposed to exercise this admitted dominion for use, or for pleasure, or from curiosity. If for use, enjoy it decently for food; if for pleasure, enjoy that pleasure, by taxing all its faculties for your comfort; if for curiosity, indulge it to the full. The more we mix ourselves with all created matter, animate or inanimate, the more we shall be lifted up to the contemplation of God. But never let it be said, that the law should indulge us in the most atrocious of all propensities, which, when habitually indulged in, on beings beneath us, destroy every security of human life, by hardening the heart for the perpetration of all crimes.

The times in which we live, my lords, have read us an awful lesson upon the importance of preserving the moral sympathies. We have seen that the highest state of refinement and civilization will not secure them. I solemnly protest against any allusion to the causes of the revolutions which are yet shaking the world, or to the crimes or mistakes of any individuals in any nation; but it connects itself with my subject to remark, that even in struggles for human rights and principles, sincere and laudable as they occasionally may have been, all human rights and privileges have been trampled upon, by barbarities far more shocking than those of the most barbarous nations, because they have not merely extinguished natural unconnected life, but have destroyed (I trust only for a season) the social happiness and independence of mankind, raising up tyrants to oppress them all in the end, by beginning with the oppression of each other. All this, my lords, has arisen from neglecting the cultivation of the moral sense, the best security of states, and the greatest consolation of the world.

My lords, I will trouble your lordships no longer than with admitting, for the sake of argument, that there may be cases, especially in the beginning, where the execution of the

bill may call for the exercise of high judicial consideration; through the dignity and learning of the Supreme Court of Criminal Jurisdiction. And here I cannot help saying, that it adds greatly to the security I feel upon this part of the subject, that when the bill shall have received the sanction of Parliament, it will be delivered over to my noble and learned friend, who presides so ably in the Court of King's Bench. From his high authority, the inferior magistrates will receive its just interpretation; and, from his manly and expressive eloquence, will be added, a most useful inculcation of its obligations. For I must once again impress upon your lordship's minds, the great, the incalculable effect, of wise laws, when ably administered, on the feelings and morals of mankind. We may be said, my lords, to be in a manner created by them. Under the auspices of religion, in whose steps they must ever tread, to maintain the character of wisdom, they make all the difference between the savages of the wilderness, and the audience I am now addressing. The cruelties which we daily deplore, in children and in youth, arise from defect in education, and that defect in education, from the very defect in the law which I ask your lordships to remedy. From the moral sense of the parent re-animated, or rather in this branch created by the law, the next generation will feel, in the first dawn of their ideas, the august relation they stand in to the lower world, and the trust which their station in the universe imposes on them; and it will not be left to a future Sterne to remind us, when we put aside even a harmless insect, that the world is large enough for both. This extension of benevolence to objects beneath us, becomes habitual by a sense of duty inculcated by law, will reflect back upon our sympathies to one another, so that I may venture to say firmly to your lordships, that the bill I propose to you, if it shall receive the sanction of Parliament, will not only be an honour to the country, but an æra in the history of the world.

MR. NASH's SPEECH,

IN THE LEGISLATURE OF NORTH-CAROLINA,

On the Bill to amend the Act for the Suppression of the odious Practice of Duelling.

IT was not my intention, when I entered the House this morning to have made any remarks upon the bill now before you. There are reasons which induced me to hope that my duty might have permitted a silent vote. But as the bill has met with an opposition perfectly unexpected, I must crave the indulgence of the House, for a few moments, in unfolding my views.

I have ever, Sir, considered the Legislature as the grand inquest of the country—as that body upon whom devolved the obligation of devising ways and means whereby vice and immorality are to be suppressed—and that it is the duty of each individual member to present to the cognizance of the whole, those avenues through which the evil propensities of human nature make their inroads upon the peace and quiet of society.

Amongst our most important duties, is that of providing security to the lives of our citizens, because the most heinous of crimes is the unlawfully taking it away. "Whoso shedeth man's blood, by man shall his blood be shed," is the precept of the divine law, and which has been recognized and adopted into the criminal code of all nations. The individual who has put his adversary to death deliberately and privately, is hunted from society as a monster unfit to live. We look upon him with shuddering disgust, and pronounce the sentence just which consigns him to an ignominious death: But if he has invited his opponent to the combat, and slays him *honorably* (as it is termed) he passes in security with impunity. Why, sir, is this distinction? It

is because a false splendor is thrown around the crime, by the daringness with which it is committed.

Few and feeble are the arguments upon which the practice of duelling is defended—while, on the contrary, those against it are numerous and weighty. Nor is it a little remarkable, that the former are drawn from the weaknesses and vices of human nature, while the latter have their foundation in its virtues. We are told, that the lofty spirit which leads the duellist to the field, is one essential to the well-being of society—placing the weak upon a level with the strong, and redressing injuries which lie beyond the reach of the law—that if you could succeed in entirely abolishing the practice, you would introduce in its place assassination. Is this true, sir? Do, indeed, the courtesies of life depend on the base principle of fear? And is this lawless practice a potent agent to correct the morals of society? Is it indeed true, that we depend on any part of our comfort, upon a practice condemned alike by the word of God and by the dictates of reason? No, sir, the idea is not to be harbored—Duelling fosters those feelings and principles which are at war with our happiness here and hereafter. What is that lofty spirit, but the spirit of revenge and pride? That deadly and vindictive principle, which, smothering every gentle and benign feeling of the heart, bids the duellist wash away the fancied insult, in the blood of the offender. To him, this man of high, punctilious honor, it matters not if his adversary have been the companion of his youth, the friend of his more advanced years; if together they have trod the flowery paths of science, or danced the giddy mazes of pleasure. At the voice of this Moloch, every virtuous feeling of the heart withers—every recollected endearment is crushed and subdued. The desolating ruin he is about to pour around others, who have never injured him, cannot arrest his progress—he presses forward to his object, regardless of every tie, social and divine; and glories in his lau-

rels, though steeped in blood, and bedewed with the tears of the widow and the fatherless! And can a practice, thus cherishing our evil passions, and destructive of the happiness of others, be important to the well-being of society? No, sir; and it is an insult to common sense to pretend it—it contains the very essence of folly.

Let me suppose a case. A husband takes into the bosom of his family, an individual whom he cherishes with a brother's love—his kindness is returned by the seduction of his wife. It will readily be admitted, that this case, if any, would justify a duel. Yet, let it be examined coolly, and Reason would pronounce, that the injured husband is not called upon to stake his life against that of the destroyer of his peace—that he has been injured sufficiently—that in a duel he would be as likely to fall as the offender. It would say to the injured husband, Look at your helpless children! You gave them existence—it is your duty to watch over and protect them. It would say, Forget the worthless woman and her seducer—his death could not heal her honor, nor the wounds your peace has sustained. No (it is answered) my reputation as a man of honor will not suffer this. 'Tis true, I am injured to the full extent of man's suffering, but my children may be still further injured; and I, their father, must deprive them of their sole remaining stay—must offer myself a sacrifice to satisfy fools and madmen! Horrible, detestible code, whose laws are written in blood; and, for the bubble, reputation, silences every better and nobler emotion of the heart. And what, sir, is this reputation, for which man impiously defies his Maker, and stakes his immortal hopes?

"- - - - - - - - 'Tis man's idol,
"Set up against God, the maker of all laws,
"Who has commanded us we should not kill,
"And yet we say we must for reputation!"

It is indeed strange, that the fear of eternal punishment should mark a man as a coward, while he whose only fear is that of the reproach of his fellow worm, should be counted brave.

> "Fear to do base and unworthy things, is valor.
> "If they be done to us, to suffer them
> "Is valor too."

But this is a valor of which the modern man of honor knows nothing, and to which he cannot rise; for it requires virtues of a hardy growth. It is valor; for it dares do right, regardless of the sneers of the witlings of this earth. Superior to their scoffs and contumelies, it defies them. The valor of the man of honor, as he is termed, is vicious,—having its foundation in the passions, prejudices, and pride of the human heart, and its fruit is death and misery. This patient valor is virtuous; for it is founded in meekness, love, and charity,—and its fruit is life and happiness. The former looks to this world for its reward and support,—to the smiles of beings weak and wicked; the latter, to a world beyond the grave,—to the approbation of a Being unbounded in power and goodness. But, sir, is it to redress injuries alone, that duels are fought? No. I venture to assert, that nine out of ten of those that occur, are fought to avenge insults existing only in the Hotspur brain of him who has conceived their existence. The closing scene of life is one of tremendous moment to every rational being. We would wish to approach it with every holy affection about us. Is this the case with the duellist when planting his foot on the verge of eternity? Is he prepared to appear before the judgment seat? Is is heart in charity with all mankind—glowing with love and gratitude to the great Author and Finisher of his being? How awful is the reverse! His heart, swelling with every malignant passion, pride, anger, and revenge, he comes to destroy and not to save—to curse and not to bless:—and in the bitterness of such feelings, is hurried un-

bidden into the presence of his Maker. But we are warned, that assassinations will succeed to duelling; that these strong and angry passions must have vent. Grant, sir, that it is probable; and that is as much as I can ask. Are we to submit to a positive evil for fear of the probable introduction of another by its suppression? To me it appears no way likely to be the case. We can reason correctly from what has been and is, to what will be, on the same subject. Duelling is a relic of those barbarous ages when all disputes were submitted to the arbitrement of force. But from the continent of Europe it has nearly fled; and in England alone, of the nations of the old world, is it found in all its vigor. Nor am I apprised, that in those countries where it is exploded, are the lives of individuals more exposed to secret violence than in England: Nor is society more refined in the latter than in the former, or the people more high-spirited. In our quarter of the globe how does it stand? In the Eastern States, that land of steady habits, duelling is unknown; while to the south, it is the passport of renown! Why is this difference? Are there among the former, none who are entitled to the appellation of gentlemen! No honorable men? Are they a tame, pusillanimous race of beings! New-England, sir, has been emphatically styled, the cradle of American Independence. Not its cradle only, but its birth-place. Her sons were the first to raise the standard of revolt. They are a nation alike distinguished for valor, and for every social and domestic virtue. It is true, in their system of morality it is a crime, unlawfully to deprive a human being of life; and they shrink, with loathing and disgust, from the bloody honors of the duellist; for they consider the crime as murder. Are assassinations more frequent there than here? If it be the case, I am yet to learn it.

The evils, sir, which I have endeavored to point out as resulting from this practice, will be readily admitted by every one who views the subject coolly and deliberately,—that no-

thing has been borrowed from fancy, but that they have been pourtrayed with a weak and feeble tongue. If then it be attended with such evils, I ask, shall we not endeavor to put a stop to it? With a view to aid in this desirable work, the bill upon your table has been presented. I will make a few remarks upon its provisions. The bill, by the first section as a amended, provides, that every person chosen to an office of profit or trust, after the first day of May next, before entering upon the discharge of its duties, shall take the oath therein prescribed. My object, sir, in this provision, is to offer to the young and thoughtless, the ambitious and aspiring spirits of our country, one more inducement to abstain from this practice. I wish to tell them, they are about to close upon themselves the doors of preferment. They will have to become their own accusers. And I do most truly believe, if you adopt this provision, you will do more to lessen the number of duels than all the gibbets in the world. Ours is a country in which, from its happy Constitution, the offices of government are open to genius of every grade. Our young men of talents, no sooner enter the busy scenes of life, than they perceive a glittering prize before them Pressing equally forward, they encounter spirits equally ambitious, restless, and sanguine. And it is by such, that most of these duels are fought. Once convince them that this act of folly and madness consigns them to the shades of private life, and many a one who now laughs to scorn the denunciations of religion, as the cloak of cowards, will pause and hesitate; and many a dispute that now is incapable of adjustment, will be amicably settled.

I am asked if I expect by this law to abolish entirely the practice of duelling? I answer, no. Such is not my expectation. But because we cannot destroy, shall we not endeavor to limit it? Because we cannot eradicate vice from the human heart, shall we not attempt to curb and restrain it?

But, sir, our laws are violated, not by our citizens only, strangers come here to settle their disputes. Our soil is made their battle-ground. I wish to purge our country of this stain,—to tell these violators of our peace to go elsewhere with their deeds of blood. The second section of this bill is bottomed upon this gri vance and points out its remedy. If it be adopted, in my opinion, it will never be required to be carried into execution. Its very existence will deter these very honorable gentlemen from risking the consequence, and they will be obliged to seek for other soil to burthen with their crimes!

ADJUDGED CASES.

SUPREME COURT OF NORTH-CAROLINA.

JANUARY TERM, 1816.

Den on the Demise of Chessun and Wife v. *Smith and Wife.*

THE lessors of the plaintiff are heirs at law of *Mary Turnbull Butcher*, and claim title to the premises described in the declaration, under the following clause in the last will of *James Turnbull.*

"*Item.* I devise unto *Bell Butcher*, all my lands not already given; I mean *Bell's Gift* and *Gard's Island*, and my lands in *Edenton*, and the remainder of my personal estate, to him and his heirs of his body, lawfully begotten; and for want of such, one-half to the heirs of *Mary Pantry*, and the other half to the heirs of *Mary Turnbull Butcher*, or the survivors of them to have all."

Bell Butcher died without issue in 1777 or 1778. *Mary Turnbull Butcher* died in 1800, and before the commencement of this suit. Neither *Mary Pantry* nor either of her sons, were ever in this country, but have continued to be aliens.

The testator, in other parts of the will, notices that *Mary Turnbull Butcher*, *Mary Pantry*, and two sons of the latter, viz. *Robert* and *James*, were alive.

TAYLOR, C. J. delivered the Opinion of the Court.

When the case of *Smith* v. *Barnes* was decided in this Court, two of my brethren felt themselves restrained, by peculiar circumstances, from taking any part in the deliberation or judgment. They have both however declared their concurrence in the reasoning and principles applied by a majority of the Court to the decision of that case; and we are all of opinion that it goes the whole length of deciding the case now before us.

The principle of that case was, that no present vested estate was devised to the heirs of *Mrs. Stith*, but an interest which was not to vest until the death of the first devisee, without having had issue, and, by his having children, to be altogether prevented. That the word "heirs" must receive its technical meaning, except where it can be collected from the will: that the testator intended that the estate of the devisee should vest in interest immediately, and that by the word he intended heirs apparent, if the ancestor be then living.

It is true, that in this will the testator takes notice that *Mary T. Butcher* was then alive; but it does not appear that she had children then, or ever afterwards.

The remainder which was limited upon the tenancy in tail to *Bell Butcher*, must be either vested or contingent. It could not be vested, because *Mary Turnbull Butcher* had no children; and if issue had been born to her before the death of *Bell Butcher*, it cannot reasonably be argued that they should be excluded by those who stood presumptive heirs at the time of the testator's death. The remainder is not limited to any definite person, but merely to those, who, upon the death of *Mary T. Butcher*, should be her heirs. It is limited, also, upon an estate tail, a particular freehold estate capable of supporting a contingent remainder.

The ulterior termination must therefore be construed a contingent remainder, which could only become vested in the event of *Mary Pantry* and *Mary T. Butcher* dying and leaving heirs, during the continuance of the estate tail. This expired in 1777 or 1778 by the death of *Bell Butcher* without issue. *Mary T. Butcher* survived him upwards of twenty years; so that the remainder to her heirs could never vest in them.

Judgment for the Defendant.

Hodges v. *Pitman.*

This was an action brought to recover back money which the defendant had won by gaming at cards, and which the plaintiff had paid at the time of playing. The cause was tried before TAYLOR, C. J. at Cumberland Superior Court, when the jury, under charge of the court, that the law was in favor of the defendant, found a verdict for him. A motion for a new trial, for mis-direction of the Court, having been made and over-ruled, the plaintiff appealed to this Court.

Henry argued for the plaintiff, and cited 7 *Term Rep.* 535, 5 *Term Rep.* 405. *Ambler* 269. *Acts of* 1788, c. 5.

M'Millan for defendant, cited 2 *Comyn Cont.* 120. 8 *Term* 575.

CAMERON J. delivered the opinion of the Court:

There is no example to be found in the books, where money has been paid, by one of two parties to the other on an illegal contract—both being *particeps criminis in equal degree*, that an action has been maintained to recover it back

again; and it is unquestionably one of the greatest securities against transactions of this description, that the contracting parties can have *no redress* against each other; and that where they are equally guilty of an infraction of the law, the claims of either may be effectually resisted.

Of a principle so salutary in its operation in restraining crimes and immoralities, we should be reluctant to weaken the force, by any refinement of construction, or subtlety of reasoning; and without a broad legislative direction to the contrary, we feel not less disposed than the able men who have gone before us, so to expound the law, rs to promote the practice of private virtue, and check the growth of this most ruinous vice of gaming.

We do not find in the act of 1788, language sufficiently explicit for this purpose. It is at best *doubtful*, and does not afford a satisfactory ground of decision, to overrule the common law. The words "other personal estate," seem to relate to specific chattels, as they follow the words "transfer of slaves," and it would be difficult, if not impossible, to enumerate all the chattels that might be so transferred. Besides, the word *transfer*, is ordinarily applied to the sale or pledge of a chattel; never to the payment of money. A horse is transferred—but money is paid. If the latter had been intended by the Legislature, it would probably have been expressed. If it is now to be understood, the act must be read thus: "the transfer of money to secure or satisfy the payment of money."

Upon the whole, we are furnished with a clear, strong light to direct us in the plain, open road of the common law, and that leads to the advancement of morality, and the suppression of vice. We ought not to be diverted from it, by the faint glimmering in the statute, into the devious track of doubtful and mischievous construction.——Judgment affirmed.

Barge v. *Wilson.*

The plaintiff claims title to the land on which the supposed trespass was committed under the will of his father, Lewis Barge. The clause in question begins: "Item. I devise and bequeath to my beloved wife Christiana Barge, the store adjoining *the tavern* lately occupied by James Baker, together with the store lately occupied by Samuel Goodwin, during the term of her natural life, and after her death to my son John Barge, and his heirs for ever." The defendant claims title to the same under the same will. The clause in question begins, "I devise and bequeath to my son-in-law John Wilson, and my daughter Polly Wilson, during their, or either of their lives, and after their deaths, to the heirs of the body of the said Polly Wilson, my large tavern in Fayetteville, lately occupied by James Baker, excepting however the room over the store, which is to belong to the store." The store-house and tavern adjoin each other. The cellar wall under the store-house is the dividing-line between the two buildings. In the rear of the buildings, and between them and the creek, there is a small piece of ground, being part of the lot on which they are erected. The plaintiff claiming the ground immediately in the rear of the store, and from the store to the creek, erected a fence, running immediately from the cellar wall under the store house to the creek. The defendant pulled down the fence, which constitutes the trespass for which the action is brought.—Both parties respectively occupy the buildings devised to them.

M' Millan for the plaintiff.—*Browne* for the defendant.

TAYLOR, C. J. delivered the opinion:

The question arising from this record, is, whether the plaintiff is owner of the ground on which he erected the fence; for if he is not, no trespass has been committed by

the defendant in pulling it down. And we are of opinion, that it was the intent of the testator to give the whole of the tenement to the defendant, except that part which is especially devised away to the plaintiff, or excepted from the devise to the defendant. Without adverting to the necessity of a curtilage to a tavern in a town, rather than to a store, and the utter inutility of a tavern without one, the exception made by the testator of the room over the store, seems to mark his own conception of what he was doing. For why, in a devise of the tavern, should he make the exception, unless he believed that such precaution was necessary to prevent the whole from passing? The room over the store is to belong to the store, otherwise, the testator thought it was comprehended in the tenement, which he describes as his large tavern. We therefore think that the true construction of this will is, that all, except the store and the room over it, were devised to the defendant, for whom there must be judgment.

LOWRIE J. dissented.

Den on Demise of Jones v. *Ridley.*

Declaration in Ejectment.....Appeal.

In this case the plaintiff produced a grant from Earl Granville to Joseph Davenport, for the land in question, bearing date the day of November, A. D. 1756. He then produced a deed from Edmond Taylor and John Potter to Howell Moss, for the same land, bearing date the day of June, 1771: thirdly, a deed for the land in dispute from Howell Moss to Vinkler Jones, bearing date the day of November, 1773; and lastly, a deed from Vinkler Jones covering the same land, to the lessor of the plaintiff, bearing date the day of June, A. D. 1798.

Under this title he produced witnesses to prove an actual possession in himself or those (or some of them) under whom he claimed. It appeared that one Searcey, as well as one Wilkins had been possessed of the land in question, but at a period ulterior to the date of the deed from Taylor and Potter to Moss. After this last conveyance, one witness said that Moss placed his father on the land, who lived on it for two years. Immediately after which time, Vinkler Jones took actual possession of it and held it for two years. Two other witnesses said that Vinkler Jones had actual possession of it four or five years. One of the latter two witnesses said, that this last mentioned possession was before the year 1775, because in that year he went to Kentucky, and knew nothing about a possession of it afterwards. It also appears, that some time after the expiration of Jones's possession, a free man of color, by the name of Henry Smith, lived upon the land by the consent of the present plaintiff, two years; and that some time after he moved away, another free man of color by the name of Hardy Artis, lived on the land, also by the consent of the plaintiff in this cause. None of the witnesses spoke positively as to the time that any one person had had actual possession of the land, but only from the best of their recollection. It appeared that an old field on the land had been for many years called Jones's Old Field.

The plaintiff produced no evidence to show the defendant in possession of the land; nor did the defendant object to the plaintiff's recovery for want of such proof; nor did the Court in its charge to the jury, say any thing on that head. It did not appear that the defendant had any title to the land in dispute.

The Court directed the jury to find for the defendant, unless they believed, from the evidence before recited, that the plaintiff had had a continued and uninterrupted actual possession of the land, for seven years.

The jury found a verdict for the plaintiff. The defendant moved for a new trial, which the Court refused.

It appeared that this suit had been instituted in the County Court of Granville, and there tried; which resulted in a verdict for the plaintiff. That the defendant appealed to this Court, and that a trial had likewise been had, when a verdict was again found for the plaintiff and a new trial granted.

It is now referred to the Supreme Court to decide whether or not a new trial should be granted.

It is further directed by the Judge to be stated, that the defendant's counsel moved the Court for a nonsuit, on the ground that a seven years' possession under color of title had not been proved;—and further, that James Hamilton, the real defendant, obtained title to the land in dispute after the commencement of this action.

TAYLOR C. J. delivered the opinion of the Court:

The repeated adjudications which have occurred in this State, throughout a long period of time, which may be dated, at least, as far back as the independence of the State, require it now to be considered as a fixed rule of property, that the possession under a colour of title, must be a continued one of seven years, in order to enable a person to recover in an action of ejectment.

It has been very justly supposed, both by those who made the law of 1715, and by those who have administered it, as far back as we have the means of ascertaining, that this was a reasonable period to warn all adverse claimants, that the person in possession set up an exclusive right, and to challenge them to come forward and exhibit whatever claim they might have against such possession.

But a possession for this period can only meet the spirit and design of the law, when it is unbroken and uninterrupted; for as it is founded on the supposition that the possessor really believes he has title, this idea is weakened rather than confirmed, by his occasionally withdrawing from the possession, and leaving the land without cultivation, without occupancy, and without a tenant.

Thus, the occasional exercise of dominion, by broken and unconnected acts of ownership, over property which may be made permanently productive, is, in no respect, calculated to assert to the world, a claim of right; for such conduct bespeaks, rather the fitful invasions of a conscious trespasser, than the confident claims of a rightful owner.

In this case, the first possession, after the date of the deed to *Moss*, is that in his father, which continued for two years. This is followed by *Vinkler Jones's* possession, which two witnesses say, continued four or five years.

It is to be observed, however, that one of these witnesses is altogether silent as to the periods when this possession began or ended; and therefore his testimony is not so satisfactory or convincing as that of the other, who gives a reason for his remembrance, and places the possession before the year 1775, because he then went to Kentucky. This possession therefore must have been before the date of *Jones's* deed, and as early as that of *Moss's*, from which to June, 1775, would form only a period of five years.

This is believed to be a correct analysis of the testimony; and if so, there are but four or five years continued possession proved, since the colour of title accrued.—The other possession by the persons of colour, is altogether too vague to be taken into the account; for neither the period of its commencement nor that of its termination is ascertained by proof; it is not sufficiently connected with the other possession nor with the colour of title.

The law arising from the facts which are in proof, does not vest a title in the plaintiff; and if the verdict stands, the plaintiff will have recovered land, of which he is not the owner.

It would introduce much uncertainty into the law, and place land titles upon a very precarious foundation, if the Court were to acquiesce in a verdict so novel, because other juries had done the same. In cases of this sort, the law of a case cannot be separated from its justice. They are indeed, convertible terms; for where the law does not give title to a plaintiff, it cannot be just that he should recover the land and turn another out of possession. We are therefore of opinion that there must be a new trial.——Judgment reversed.

HALL J. gave no opinion; it being an appeal from his decision.

Williams v. *Harper*.

This cause was tried before SEAWELL J. at Warren Superior Court, where, on its being called in due course on the second day of the term, and the plaintiff failing to appear, he was nonsuited. In the course of the same day, he came into court and moved for a new trial, upon an affidavit which stated in substance, that he had attended the preceding day, and went home at night for the purpose of procuring the attendance of a very material witness, who had been subpœnaed for him; that on Tuesday morning he called upon this witness, whom he found unable to attend, from the effects of a severe illness, and the deponent then hastened to court, where he arrived too late, but as soon as he well could, considering the distance of his abode and the delay occasioned by his calling on the witness.

In this case, upon the death of M'Laughan, who was in possession of the fund as a trustee, that fund passed to his administrator, who could only stand in his shoes, and represent him in the character in which he originally stood; and upon the death of this administrator, the fund coming into the hands of *his* administrator, could acquire no different character, but still remained, in equity, the property of complainant; and has passed on in like manner to the defendants, who have moved to dismiss the bill. Now the objection that the property should first come through the medium of the administrators of *Blanchard*, with the view of paying creditors, completely fails; because these administrators, as well as the administrators of *Devan* (who may assert *Devan*'s right) are made parties, and who have it in their power to set up such defence as completely as if they were the only defendants. The case from *Ch. Cases* 57, *Nicholson* v. *Sherman*, was where a legacy was devised, and testator made baron and feme his executors and died: The baron afterwards made the feme, and his son *his* executor, and dies: The legatee exhibited his bill against both the feme and the son, charging that the *estate* of the testator who devised the legacy, had come to the hands of both; and upon demurrer, the same was disallowed, though the want of privity in law was there urged: And to the same principle are the cases in 2 *Vern.* 75, and 4 *Vesey, ju'r.* 651.*

Casey v. *Fonville.*

SEAWELL, J. stated the case and delivered the opinion of a majority of the Court, as follows:

The plaintiff's wife while sole, purchased of the defendant a slave; to secure the title of which, defendant gave a bill of

* This being an Appeal from the decision of TAYLOR C. J. he gave no opinion.

sale, with warranty as to title. Upon the marriage, the slave passed into the possession of the husband; and the wife dies. An action is then brought against the husband, and the slave recovered by one having superior title to defendant; and the plaintiff, in his own right, institutes the present action of covenant, upon the warranty in the bill of sale to the wife;—and the question is, can he maintain it in his *individual* character?

It was a saying of Lord Kenyon, that if *cases* and *principles* were at variance, the latter must be adhered to; and we think so too. The general principles respecting the rights which a husband acquires by marriage, seem to be as clearly laid down as any belonging to the law: and as regards her personal estate, that the marriage itself is an unqualified gift to the husband of all she is in possession of, whether he survive her or not. But as to such as she has not in possession, or as rests in action, as debts, contingent interests, and the like, or money due her on account of intestacy,—the marriage gives them only *qualifiedly*, namely, upon condition he reduces them to possession *during coverture*. For if she dies first, they go to her representative; if she survives, they belong to her. *Co. Lit.* 351. & *no.* 1. The husband, it is true, is entitled to administration, and as administrator, may recover them. These rules never have been questioned; and all the decisions on this subject, are professedly in accordance with them.

The slave then, in the present case, being in possession of the wife, passed upon the marriage, absolutely to the husband. But the covenant, which was a contingent and uncertain right, or more properly, was in *action*, remained to be asserted or not, according to its nature; and the wife having died before this right in action was reduced to possession, it is impossible, in the opinion of a majority of the Court, for the husband, consistently with the rule laid down, to maintain the action. If the marriage had the effect of trans-

ferring to the husband a complete legal right to the covenant, as has been contended, the representatives of the husband, if he were dead, could maintain the action; though the wife had survived the husband, and were alive. We can perceive no solid distinction between this, and any other covenant with the wife, before marriage. Its relation to a piece of property which became legally and absolutely vested in the husband, cannot affect its essential quality as a chose in action, and that the husband can no more maintain the present action than any other person to whom the wife, while sole, might have sold or given the slave,—the covenant being a mere *personal* contract, which abides with the *parties or their representatives.*

HENDERSON, J. and TAYLOR, C. J. dissented.

Den on the demise of the Trustees of the University v. *Holstead.*
Idem v. *Marchant.*
Idem v. *Parker.*

These were ejectments tried at Currituck Superior Court, at September Term, 1812, when the jury found special verdicts in the three cases, which, by consent, were referred to this Court.

The material facts found were, that about the 20th of December, 1788, *John Cockton* died, seised of the premises described in the declarations, having duly executed his last will, whereby he devised them to his wife *Agnes Cockton*, during her natural life, then to be equally divided between his two daughters, *Mary Tatum* and *Barbary Conpun*, to them and their heirs for ever; by virtue of which devise, Agnes entered, and on the 23d December, 1795, by deed of bargain and sale, conveyed in fee to *Jesse Simmons*, who,

on the 31st May, 1796, conveyed in fee to the defendant, who has actually been possessed thereof to the present time.

Barbary, one of the daughters, died in the beginning of the year 1792; *Mary*, the other daughter, died shortly afterwards, neither of them leaving any children, brothers or sisters, or the lawful issue of such; nor any heirs on the part of the father or mother, except the said *Agnes*, the mother, who survived them, and died on the 12th December, 1805, without leaving any heirs.

Browne, for the defendants, argued that the daughters took as purchasers under the devise. *Com. Dig. Assets B.* 1 *Leon.* 315. *Com. Rep.* 123; and that by their death without issue, and the failure of heirs on the part of the father, the land became vested in the mother for life, by the 7th & 3d sections of the acts of 1784, c. 22 & 10; that the deed made by *Agnes*, should be considered as a feoffment which passed a fee, and displaced all remainders and reversions, according to the opinion of *Johnson J.* in *Wells* v. *Newbold*, decided in this Court. He also cited 1 *Bl. Com.* 87. *Plowd.* 203. 1 *Co.* 93.

TAYLOR, C. J. delivered the opinion of the Court:

The first question to be decided in this case, is, whether the daughters took by descent or by purchase; for if they took by descent, the succession to them must be confined to the blood of the ancestor from whom they inherited, and this being extinct, the estate is vested in the University, as an escheat.

The rule of the common law is very distinct and well established, that where a person devises lands to his right heirs, without changing the nature or quality of the estate, although it be charged with incumbrances, the heir shall be in by descent, a title always favored by the policy of the law,

The cases on this subject proceed on the supposition that there is no election in the heir to take by descent or purchase, for the descent is immediately cast on him, and the devise is considered as having no operation at all.

For if the heir might, at his choice, have taken by purchase, the lord would have lost many emoluments of his seigniory, and the specialty creditor of the ancestor, the fund which was answerable for their demands, for until the *Stat. Will. 3d*, the devisee was not liable.

But if, on the other hand, the devisor alter the estate, and limit it differently from what it would descend to the heir, he shall take by purchase. Hence the cases cited by the defendant's counsel, prove unequivocally, that if at common law a person had devised to several daughters in fee, who would have been his heirs at law, they would have taken as purchasers; for had they succeeded as heirs, it would have been in parcenary, whereas by the devise, they take in joint tenancy, or in common.

It is now proper to look at our act of Assembly regulating descents, and to learn from it how lands are held which descend on several co-heirs; and the words are very explicit: "The estate shall descend to all the sons, to be equally divided amongst them, and for want of sons, to all the daughters, to be equally divided amongst them severally, share and share alike, as tenants in common in severalty, and not as joint tenants."

It is not necessary to cite authorities to prove, that the devise to the daughters in this case, gives them a remainder as tenants in common. The words "equally to be divided," have repeatedly been adjudged to be, in a devise, words of severance.

As, then, the daughters took the same estate under the will, that they would have taken had the ancestor died intes-

tate, it follows, that they were in by descent, and the devise was void.

After an attentive consideration of the acts of Assembly regulating descents, and particularly of the act of 1784, c. 22, sec. 7, we adopt the opinion, that none of the cases provided for, comprehend a descent from the parent, so as to vest a life-estate in the mother.

The parent shall succeed, where the child derives the estate from him; but that must be by some act *inter vivos*, for the parent must be dead before the child could derive it by descent from him. The parent shall also succeed where the child actually purchases the estate, or otherwise acquires it. The just construction of this clause, we think equally exclusive of the case of a descent from the parent, for reasons, which having heretofore been elaborately stated, it would be a waste of time to iterate. The opinion of the Court being in favor of the plaintiffs upon these points in the case, it is unnecessary to notice the others.——Judgment for the plaintiffs.

Jordan v. *Jordan's Ex'or.*

This was an Injunction Bill filed in the Court of Equity for Hyde County, where a motion was made to dismiss the bill for want of equity. That question was referred to this Court, upon the allegations contained in the bill.

The cause was submitted without argument.

TAYLOR, C. J. delivered the opinion of the Court:

The bill charges that the complainant was advised by his brother, the testator of the defendant, to invest $100 in the purchase of a slave, which he consented to do, and ac-

cordingly paid that sum to the defendant, who made the purchase for him. That this transaction took place about the year 1783, when the defendant delivered the slave to him, acknowledging his right and admitting that the purchase was made with his money. That, about the year 1788, the complainant became surety to his brother for one *Cosmo de Medici*, in the sum of $100, and the principal having left the State, that sum was demanded from him as surety, with a threat from his brother, that if payment were not made, he would keep the title of the negro as security; and the complainant being unable to prove the payment by *Medici*, did accordingly pay the debt. That afterwards the defendant's testator instituted an action of detinue against the complainant, to recover the negro;—and upon the trial, produced a bill of sale in his own name, dated in 1783, but registered immediately before the commencement of the suit. This claim was met by the complainant by proving his long possession, and payment of the purchase money. Upon which the defendant set up a claim of property, on the score of a pretended agreement as to the debt of *Medici*; on which the complainant was wholly surprised, and, being unprepared to repel that ground of claim, a verdict and judgment were rendered against him.

These are the material grounds of the bill, and they certainly charge a trust in the defendant's testator; the execution of which, it is one peculiar attribute of this Court to enforce. The property being bought with he complainant's money, and for his use, gives him an undoubted claim to the interposition of this Court, although the bill of sale conveys the legal title to the defendant. Over cases of trust the jurisdiction of this court can only be taken away by showing a complete execution. The delivery of the slave to the complainant cannot be considered as an execution of the trust; for the possession was consistent with it. Nor can it be collected from any other circumstances in the case that there

was an extinguishment of the trust. They are at best, but evidence of it; and such a fact ought to appear to the Court in as satisfactory a manner as the original creation of the trust. As therefore this cause is sent up on the case made in the bill, we are of opinion that this Court has, *prima facie* jurisdiction, and that the Injunction ought to be continued to the hearing.

Parmentier & wife & others v. *Phillips & al.*

This was an original bill in equity, praying for the appointment of commissioners to sell a tract of land, and to distribute the proceeds thereof, according to the will of *John Phillips*, amongst the complainants, who are minors, and the heirs at law of *Henry Phillips*, deceased, the devisee in the said will.

The amended bill calls upon the defendants for a discovery and account of the rents and profits; and that they may be decreed to deliver up possession of the land, in order that it may be sold.

The case made by the bill is in substance as follows. *John Phillips* died in 1784, having made his last will, in which he gave all his estate to his wife during her widowhood, for her support and that of his children, with direction that each of them should have a certain portion of the personalty, as they married or arrived at full age. On the death or marriage of his wife, he directs that the land shall be sold by his executors, and the money arising from it, to be equally divided among his sons, who shall then be living, or the heirs of their bodies, in case either of them shall have died before the said sale, leaving lawful issue.

Sarah, the widow, died in 1806, unmarried, at which time there was no son of the testator living, nor the issue

of any, except Patsey, the wife of *Parmentier*, the complainant, *Jordan Phillips*, *William Phillips*, *Eaton Phillips* and *John Phillips*, who are all the heirs and representatives of *Henry Phillips*, one of the sons of *John*, the testator.

Henry Phillips, in the lifetime of his mother Sarah, and without having a right, conveyed the land to *Frederic Phillips*, who, together with the other defendants, viz. *Hart*, *Jones* and *Bell*, were in possession when the bill was filed.

All the executors appointed in the will of *John Phillips*, have died without leaving executors.

To this bill there was a demurrer, on the ground that if the complainants have the right they pretend, they may assert it at law, by the action of ejectment.

TAYLOR, C. J. delivered the Opinion of the Court.

The twofold object of this bill is, to effect an execution of the trust in the sale of the land, which has been prevented by the death of all *John Phillips's* executors, in order that the proceeds may be divided amongst the complainants; and to call the defendants to an account for the rents and profits of the land. And we are of opinion, that for both these purposes, the suit is rightly instituted in this Court. It seems to have been long established as a rule of this Court, that when a person enters upon the estate of an infant, and continues the possession, equity will consider such person as a guardian to the infant, and will decree an account against him, and will even carry on such account after the infancy is determined. Even in those cases where the title is purely legal, and the complainant is put to his election to proceed at law or in this Court, where the bill is filed for the land and the mesne profits, he may proceed at law for the possession, and in equity on the account; because at law he can recover the mesne profits only from the time of entry laid in the declaration. The authorities which relate to this point

are, 1 *Atk.* 489. 3 *Atk.* 130. 1 *Ch. Rep.* 49. 2 *P. Wil.* 645. *Pr. in Ch.* 252. 1 *Vern.* 296.——Demurrer overruled.

Delamothe v. *Sarah B. Lanier, Executrix of Clement Lanier.*

In this case a *scire facias* had issued against the defendant, to show cause why judgment should not be rendered against her on a bond given by her testator, jointly with *Thomas C. Williams*, on an appeal obtained by said *T. C. Williams* from the County Court of Montgomery. A judgment was obtained by the plaintiff against *T. C. Williams*, at September Term, 1809, after the death of the defendant's testator. No motion was then made for judgment against the securities on the appeal bond. And the *sci. fa.* was made returnable to May Term, 1812, when the defendant pleaded, "Nul tiel "record, former judgments, payments made on specialties "and simple contract-debts before notice, and judgments "obtained against defendant on simple contract debts with-"out notice—which has exhausted and attached the assets, "no assets ultra, fully administered."

At May Term, 1814, the following judgment was given by the Court: "*The judgment of the Court is, that there is such a record.*"

Question for the Supreme Court, Whether the defendant can give in evidence judgments obtained on simple contracts rendered against her before issuing or notice of this *sci. fa.* and without notice of the bond; and whether this bond is to be considered such a debt of record that judgments on debts of inferior degree, without notice, and payments thereon, amount to a devastavit?

The case was submitted without argument.

in the common law, which does not sanction any obligation founded upon a consideration, which contravenes its general policy. This impresses upon the transaction an inherent defect, which cannot be removed by the most deliberate consent of the parties, or the utmost solemnity of external form.

Were it otherwise, there is no law, however important to the public welfare and happiness, which might not be paralized by the private agreement of individuals; and it would seem extravagantly absurd, that the law might be called upon to enforce a contract, whose essence and vitality are founded upon the violation of law. For all laws might be overthrown, if men could enter into covenants not to obey them; and if courts of justice recognized the validity of such engagements, the law would be accessory to its own destruction.

The consent of parties alone to a contract, does not impart to it obligatory force; it is also necessary that the subject of it be such as they have a rightful power to contract about. He who receives a vicious bond, does by that very act, relinquish all claim to the favor of the law, inasmuch as he does, as far as he can, give another an unjust and unlawful power over him.

This principle is very fully illustrated in *Collins* v. *Blantin*, 2 *Wils.* 347, where the defendant and others being indicted by one *Rudge*, the plaintiff gave his note to *Rudge*, to induce him not to prosecute; and the defendant, to indemnify the plaintiff against the note, gave the bond in question. *Rudge* did not prosecute; and the plaintiff paid him the amount of the note, and then sued the defendant on the bond, who having pleaded the consideration, it was resolved, that the note being given for an illegal purpose, viz. the compounding the prosecution, and the bond given to secure and repay that, that the bond was illegal and void.

In many subsequent cases, the same doctrine has been enforced, and they all establish, that every transaction, the object of which is a violation of a public duty, is void; such as bribes for appointing to offices of trust; private engagements that an office shall be held in trust for a person, by whose interest it was procured; agreements to stifle prosecutions of a public nature: All these considerations have been respectively brought into judgment, and pronounced illegal. And wherever it is attempted, by a contract, to prevent the due course of justice, the law gives no remedy upon it. As if a man promise money to another, in consideration that he will not give evidence in a cause; such promise cannot be enforced, on account of the illegality and iniquity of suppressing testimony in any cause.——Judgment for the defendant.

Grizza Collins, widow, v. *The Executors of Shadrach Collins, deceased.*

The testator died in November, 1814, having made and duly published his last will in writing; whereof he appointed the defendants his executors, who caused the same to be proven at February Term, 1815, of Edgecomb County Court.

The petitioner, his widow, being dissatisfied with the provision made for her by the will, entered her dissent to the same at the same Term, and exhibited this petition to the County Court, claiming the benefits of 29th chap. Acts of 1796,—alleging that by her dissent to the provision made for her by the will, her husband died *intestate as to her.*

CAMERON, J. delivered the Judgment of the Court*.

* TAYLOR, C. J. *dubitante.*

The widow's claim to the benefit of the act of 1796, ch. 29, depends entirely on the husband's dying intestate generally. Where he leaves a will, and she dissents to the provision made for her by it, such dissent, only produces a *partial* intestacy as to her.

The words of the act are "where a man shall die intes- "tate, leaving a widow," &c. Here the husband did not die intestate. He disposed of all his estate by will duly executed and published; and thereby made provision for his wife. He could not foresee that she would be dissatisfied with that provision and claim the privilege of dissenting from it.

According to the construction of the act contended for in behalf of the petitioner, it is not the omission of the husband to make and publish a will in his lifetime, but the act of the widow, which renders him intestate. By her acquiescence in the will, the husband dies testate; her dissent produces intestacy. It depends wholly on her conduct, after the death of the husband, and after his will is admitted to probate, whether he is to be considered as having died *testate* or *intestate*.

This surely is not such a *dying intestate*, as is contemplated by the act under consideration. In support of this opinion, let it be further observed, that the act directs that "where a man shall die intestate, leaving a widow, she may "take into her charge and possession so much of the crop, "&c. then on hand, as may be necessary, &c. until letters of "administration shall be granted," &c. Now the Legislature could never have intended to interfere with the will of the testator, or the rights of the executors, by authorising the widow to take into her possession that property which the law, operating on the will of the testator, authorised them alone to take possession—yet the construction of the act

contended for in behalf of the petitioner, would produce that effect.

Sales of the perishable estate of intestates usually take place immediately after administration is granted. The allowance for the widow and family should be set apart before such sale takes place. Hence she is required by the act to exhibit her petition "at the same court when administration is granted." Yet if by entering her dissent to the will, she can entitle herself to a year's allowance out of the crop, &c. she may do it *six months* after the probate of the will; when, in all probability, the executors have sold the perishable estate and disposed of the proceeds according to the will of their testator. Out of *what* will her year's support, in such case, be allotted?

The act of 1784, ch. 22, authorises the widow to enter her dissent within six months after probate of the will, and enacts, "notwithstanding her dissent, if the jury find and "return that 'she is as well provided for by the will as by "taking that allotted to her by law in case of her dissent,' "she shall be therewith content." Suppose a year's provision allotted to the petitioner, according to the construction of the act contended for in her behalf, and that the jury to be empannelled pursuant to the directions of the above recited act, should find that the legacy given to her by the will is equal in value to the distributive share she would take under the act of Assembly with which, in the words of the act, *she shall be content*, it would then appear that the widow of a man, not dying intestate either *generally* or *partially* (as respects his wife) had received the benefit of the act intended for those only whose husbands die *intestate*: and that she had received a portion of her husband's estate, not allotted to her by *his* will, or justified by the act in question.

Such difficulty can only be avoided, by bearing in mind, that the Legislature never intended that the acts of 1784 and 1791 on the same subject, and the act of 1796 (the act in question) on a different subject, should be blended together in their operation and effects.

A majority of the Court is of opinion, that the widow of a man dying and leaving a last will, cannot, by her dissent to such will, entitle herself to the benefits of the act of 1796, ch. 29, in addition to those conferred on her by the acts of 1784, ch. 22, and 1791, ch. 22.——Wherefore Judgment for defendants.

SEAWELL, J. I cannot yield my assent to the opinion of a majority of the Court, in this case.

I think we are disregarding the obvious meaning of the Legislature through a ceremonious respect to the words they have used.

In the exposition of all instruments, the intention of the makers is the only guide. And as regards statutes, it is a very ancient rule, to consider the old law, the mischief, and the remedy. And Lord Coke has ventured to assert, that it is the office of Judges always to make such construction as shall repress the mischief and advance the remedy, according to the true intent of the makers. *Heydon's case*, *Co. Rep.* and *Sir E. Plowden*, who is denominated by Lord Coke a grave and learned apprentice of the law. In a *nota bene* to the case of *Eyston* v. *Studd*, 2 *Plow.* 465. it is said, "that it is not the words of the law, but the internal sense "of it, that makes the law: that the law consists of two "parts, a body and soul; that the letter is the body, the "sense and reason the soul,—*qua ratio legis est anima legis*; "and that the law may be resembled to a nut, which has a "shell and kernel within; the letter representing the shell, "the sense the kernel. And as you will be no better for the

"nut if you make use only of the shell, so you will receive "no benefit from the law if you rely only on the letter." And Chief-Justice Brook, another venerable sage, in *Hill* v. *Grange*, reported by Plowden, in speaking of the construction of statutes, says, "that when an act is made to remedy a mischief, that in order to *aid things in the like degree*, one *action* may be used for another, one *thing* for another, and one *person* for another, notwithstanding that in some respests the thing is penal As in the action of waste given by *stat. Glou* against termers for *y ars*, by *equity* it is extended to him who holds for a *half year*; so the *stat. of Westm.* which gives an action against a jailor who lets out one committed for arrears of account, is extended to a case of commitment for *debt*. So the *stat. Wilm.* which gives a *cui vita* after coverture dissolved by death, extends to a case of divorce. So one *thing* for another, as an *elegit de mediatatum suæ terræ*, which is given by *stat.* yet it extends to a moiety of a *rent*. And in respect to *persons*, the *stat. 4 Ed.* 3. gives an action *de bonis asportatis*, to executors, yet it is extended to administrators."

Servilely treading in the footsteps of these great fathers of the law, let us pursue their mode, and first enquire, how the old law stood, what was the mischief, and what the remedy the Legislature has applied? What the law was, and what the mischief intended to be remedied, are recited in the act itself. We are not left at large to conjecture or put in difficulty to collect from the remedy what was the disease; but the Legislature themselves, in an act, the title of which is to make "further provision for the widows of intestates," recites in the preamble, "that it is in the power of administrators to dispose of the whole of the crop and provisions of the deceased, and thereby deprive the widow of the means of subsistence for herself and family." To remedy which mischief they declare, "that whenever any person shall die

intestate, the widow may petition and she shall be entitled to a year's support."

By the act of 1784, it is declared, that if any person shall die intestate, or make such provision by will as shall not be satisfactory to the wife, upon signifying her dissent, she shall be endowed of a third part of the lands and a child's part of the personal estate,—placing the widow dissenting, precisely in the same situation as if no will had been made.

In the present case the widow dissented, and on her petition for the year's support, in virtue of the act of 1796, she is told, you are not within the meaning of that act, because your husband made a will, and the act only relates to the widows of those who died intestate.

Now it is very clear that the mischief which the Legislature intended to remedy, was the inadequacy of the provision allowed by *law*; and that the petitioner's case is precisely such a one; that is to say, she is a widow who has received only what the *law* has provided for her, petitioning in virtue of the act of 1796, which act declares that its design is, to make such widows a further provision. If her case then, comes within the mischief intended to be remedied, it would seem, that inasmuch as it was the *mischief* the Legislature was aiming at, that she ought, by an equitable construction, to receive its benefit. The statute *de bonis asportatis* only enabled the executor to sue; yet, for the sake of reaching the mischief, it was extended, by construction, to an administrator. But let us examine if this difficulty in reconciling this case with the *words* of the act of 1796 cannot be gotten over. For if it can be shown, that the husband did die intestate, the petitioner will then be within both the *design* and *words* of the act—and this, to me, has not half the difficulty, as making an executor mean *administrator*, a rent issuing out of land mean the *land itself*, or a dissolution of marriage by death a dissolution by *divorce*; all of which have been done.

When a wife dissents to the provision made by a husband in his will, he thereby, as to her, dies intestate, in the same manner as he would do in case of a lapsed legacy not otherwise guarded, or as to real estate in case of a will with one witness; and whether as to the rest of the world, the husband died testate or intestate, is of no importance in the present inquiry. It can only be material, when a petitioner has been already provided for, and then only to prevent, as it were, a double portion; one from the bounty and duty of the husband, the other which the *law* has provided for those who have no other resource.

If the act is to receive this nice construction, what should we do with a case where a husband, possessed of a large estate, made no other will than barely to appoint executors who should refuse to qualify, and the widow should petition for her year's support? I can hardly suppose her petition would be rejected. And how does the present case differ from that in principle? The petitioner has received nothing from the bounty of the husband; he either omitted her entirely in the will or made such provision as she chose not to rely on, and has applied to the law. She has no other subsistence for herself or family than that which the law has allowed her, and this she may be kept out of for two years by the executor;—and as to the personal estate, that even may be swept away by creditors; and she is, in the mean time, either to beg or starve. Such a construction, therefore, seems to me at variance both with the letter and spirit of the act.

If it be asked, what is the situation of a widow who does not dissent, where the debts against the estate are sufficient to swallow up the assets? I answer, she acts with her eyes open. She may rely if she chooses, upon the provision made by the husband; and if she is doubtful of that, she ought to dissent, and rely upon the law. The maintenance allotted

her is exempted from the demands of creditors and claimants.

It is to me matter of regret, that any case should arise, in the determination of which, a difference of opinion should prevail; and greatly as I at all times respect the opinions of my brethren, when in opposition to my own, I cannot from mere respect, without conviction, subscribe to a construction, in my understanding, so much at variance with the true meaning of the act.——A majority being of a different opinion, there must, however, be judgment that the petition be dismissed.

Office v. *Gray*.

The defendant was endorsed as prosecutor on an indictment against *Gassett*, for malicious mischief, which was quashed by the Court, and the prosecutor ordered to pay the costs. An execution accordingly issued against him, comprehending the charges for the witnesses summoned for the State, as well as those summoned for the defendant. To set aside the execution, so far as it related to the witnesses, was the object of this motion, which was referred to this Court, from the Superior Court of Randolph.

TAYLOR, C. J. delivered the judgment of the Court:

We do not apprehend that any of the acts of Assembly on this subject, will, when fairly construed, warrant the taxation of the costs of witnesses against a prosecutor, under the circumstances of this case.

The first act of 1779, c. 4, authorises the Court to order the costs to be paid by the prosecutor, where the State shall fail upon the prosecution of any offence of an inferior na-

ture, in case such prosecution shall appear to have been frivolous or malicious.

The uniform exposition of this act, has confined it to a failure by an acquittal of the defendant; because it contemplates that the witnesses must be examined in presence of this Court, to the end of enabling them to judge whether the procecution is frivolous or malicious.

If it extended to other cases of failure, then it would embrace that of a *nolle prosequi*; yet in 1797, it was thought necessary to pass an act to provide for that case, and to authorise the Courts to tax the prosecutor with costs, if the prosecution was promoted on frivolous or malicious pretences and grounds. And this, it is believed, can only be made known to the Court by testimony.

The only remaining act is that of 1800, c. 17, which provides, that if the defendant be acquitted on any charge of an inferior nature, the Court may order the costs to be paid by the prosecutor, if such prosecution shall appear to have been frivolous or malicious.

An indictment may be quashed if the offence be not indictable, or if it is not set forth with legal precision; but if it is free from these imperfections, it is not easy to conceive how it could be quashed for being frivolous or malicious. This could only be done by a law authorising the Court to proceed as in the case of a *nolle prosequi*.

We are therefore of opinion, that all the witnesses' tickets should be struck from the taxation of costs.

Mumford & others v. *Terry*.

This is an action on the case (for a nuisance) to recover damages done to the plaintiffs, in consequence of the defend-

ant's having erected a mill dam across the same stream on which the plaintiff's mill stands, and below it. The declaration contains three counts. 1st. That the defendant erected a dam on the same stream, below the plaintiff's mill—in consequence whereof, the water was thrown back on the wheel of the plaintiffs' mill, whereby, &c. 2d. That the plaintiffs have a good mill-seat on the same stream, and below their present mill—that the defendant hath erected a dam below said mill and mill-seat, in consequence whereof, the water reflows, becomes dead, &c. and the plaintiffs cannot remove their mill to such mill-seat below their present mill, or build a new mill at such seat. 3d. That the foundation of the present mill owned by plaintiffs, has become ruinous, &c. that there is a good mill-seat on the same stream below, belonging to the plaintiffs—that the defendant hath erected a dam below said mill-seat, in consequence whereof, &c. as in the 2d count—whereby, &c.

The defendant pleads to the jurisdiction of the Court, the plaintiffs having commenced this action originally in this Court, without having *first* filed their petition in the County Court, in conformity with the act of Assembly passed in 1809, c. 15, and without there having been any proceedings between the parties under said act.

It is submitted to the Supreme Court to decide, whether the plaintiffs, who sue for an injury alleged to be done by the erection of the dam attached to a public mill by the defendant, can maintain such original suit in this Court, without having first filed a petition, &c. as required by the aforesaid act of 1809, c. 15. Should the Court be of opinion that such suit cannot be *originally* brought and maintained in this Court, without a previous compliance with the requisites of said act, then the plea to be sustained, and this suit to be dismissed. Should the Court be of a contrary opinion, then the plea to be overruled, and the defendant to answer over.

The case was argued by *J. Williams* and *Henry* for the plaintiffs, and *Browne* for the defendant.

TAYLOR, C. J. delivered the opinion of the Court:

We have not doubted for a moment as to the design of the Legislature in passing this act, or the construction which, as well the terms of it as the mischiefs it was evidently intended to remedy, require it to receive.

The object of the act is to modify the common law right, because it was susceptible of abuse, and might sometimes be employed oppressively to the defendant, without affording proportional redress to the plaintiff; and to suspend it in all cases, except those provided for in the 5th section, the words of which are, "in all cases where the jury shall assess the yearly damage as high as the sum of ten pounds, nothing contained in this act shall be so construed as to prevent the person thus injured, their heirs or assigns, from suing, as has heretofore been usual in such cases; and in such cases, the verdict and judgment of the jury on the premises, shall only be binding for the year's damage preceding the filing of the petition."

In every case, therefore, of a person's receiving injury from the erection of a mill, a petition must be filed, in order to ascertain the extent of it, because upon that depends, whether the common law remedy is exerciseable. If the damage assessed be under ten pounds, the action is wholly taken away; if it be over that sum, the action is left to the party. Now when the act declares that nothing in it shall be so construed as to prevent persons in whose favor the jury have assessed the annual damage to the amount of ten pounds, from bringing an action, it is equivalent to express words of exclusion, as to all those in whose favor a less sum is assessed.

The general rule of construing affirmative statutes is, that they do not take away the common law, but leave the

party his election to proceed on either; yet if an affirmative statute introduce a new law, and direct a thing to be done in a certain manner, that thing shall not, even although there are no negative words, be done in any other manner. *Plow.* 206. The case before us is still stronger, because it contains what are equal to negative words. The demurrer to the plea must therefore be overruled, and the suit dismissed.

Berry v. *Haines.*

This was a motion to set aside an execution issued against *Berry*, who had executed a bond under the suspension act, as security for *M'Glinn* for the stay of an execution against him, at the suit of *Haines*. The bond was given to the sheriff, who had the execution in his hands. The affidavit of *Berry* states that the act of 1812, " to suspend executions for a limited time," under which the bond was given, had been solemnly declared, by the Supreme Judicial Tribunal of the State, unconstitutional and void, and that execution had issued against *Berry* without suit having been brought against him, or any notice of a judgment to be moved for against him in his absence, and without an opportunity of being heard or making defence.

No argument was made in the case.

TAYLOR, C. J. delivered the Judgment of the Court:

The act " to suspend executions for a limited time" was brought under the judgment of this Court, in consequence of an application on the part of a debtor, to obtain the benefit of the stay.

The application was rejected on the principle, that the act in allowing such stay, impaired the obligation of contracts, and thereby violated the Constitution of the United States.

It was not intended by the case of *Crittenden* v. *Jones*, to anticipate any legal consequences which might appertain to those cases where the suspension had already been effected, further than to declare that it must thenceforth cease to operate, and that execution might promptly issue.

As the *spirit* of that decision was protective of the rights of creditors, so now, when we are called upon to consider its *operation* and *effect*, we are of opinion, that it left them in the unimpaired possession of those added cautions and securities of their claims, which their debtors had voluntarily imparted to them. For the idea must be borne in mind, that on the part of the debtors, there was no compulsion; they spontaneously did whatever was necessary to obtain the benefit of the act. Many did omit, and all might have omitted to ask any indulgence under it. On the part of the creditor, it was all compulsion; for whether he approved or not a compliance with the terms of the act would place the debt beyond the reach of legal process, for a shorter or longer period.

A law may be constitutional and valid in some points, and in others not so; and as the only reason why any part of the suspension act was deemed void, was, because it impaired the obligation of contracts, it follows, that such parts of the act as do not lead to that conequence, must be effectual.

It is only by a discriminative construction of this sort, that we can avoid the most palpable legal absurdity, blended with the grossest injustice.

It would appear extremely paradoxical to lay down the position in the abstract, that the obligation of contracts may be impaired by a law, which has been declared unconstitutional by the Judiciary, and so declared, because it did impair the obligation of contracts. Yet nothing is more easily

demonstrated, than that such consequences may, and probably will ensue, if the executions in these cases are set aside, and the securities discharged.

A sheriff had in his hands an execution against a person who was able to pay the debt, but who before the levy, gave the necessary bond and obtained the stay; he afterwards becomes insolvent, and the bond given by him and his securities is declared void, because taken under an unconstitutional law. In such case, that very law operates to deprive the creditor of his debt. And the case is yet stronger, where a levy is actually made, for the property must have been restored under the 4th section of the act. In both cases, the extended arm of the law was prepared to do justice to the creditor, when it was palsied by the touch of the Suspension Act; but the return of its animation, is marked by an increase of its vigor, derived from the very causes that impeded its functions. Like ANTÆUS, it has touched the ground but to receive new strength.

With respect to the other reasons stated in the affidavit, that execution hath issued against *Berry*, without suit or notice, or the opportunity of being heard, it seems only necessary to remark, that the Legislature had an undoubted right to invest these bonds with the force of judgments, because every person who should thereafter sign them, either knew, or might have known, the footing on which they were placed. And although it is a dictate of natural justice, as well as a rule of the common law, that no one should be condemned unheard, or without having an opportunity of being heard, yet it is competent for a person to enter into a contract, by which he waives this right, *quilibet potest*, &c. And this has been done by all those who executed these bonds under the act.—We are all, therefore, of opinion, that the *Certiorari* should be dismissed.

Cotten v. *Powell.*

Detinue for a slave. The plaintiff claimed title under a parol gift from *Wall*, whose daughter he had married. The proof of the gift was, that the slave had been sent to the plaintiff's house by *Wall.*

The defendant claimed title under a mortgage made by *Wall* to him prior to the gift; but the mortgage-deed was unattested. And the case was reserved upon the two questions: 1. Whether a subscribing witness was essential to the mortgage? 2. Whether a written conveyance was necessary from *Wall* to the plaintiff, under the circumstances above stated.

The case was submitted.

TAYLOR, C. J. delivered the judgment of the Court:

The first question arises under the 3d sect. of the act of 1792, c. 6, which requires, that where a written transfer or conveyance of a slave is introduced to support the title of either party, the due and fair execution of such writing shall be proved by a witness subscribing and attesting the execution.

The first section of this act has received a construction in the case of *Bateman* v. *Bateman*, wherein it was held that a valid sale might be made between the parties themselves, without delivery; that being necessary only where creditors or third persons were concerned. The reasonin g which seemed to the Court to justify such a construction, and which it is not necessary here to repeat, goes the full extent of proving, that in this case, a subscribing witness is not necessary to the mortgage-deed, since the control is between the parties to it, or those claiming under them; and there are no interfering claims of creditors, or third persons, to call for a literal interpretation of the act.

We are of opinion, on the other question, that a written transfer is necessary in all cases, where a person gives slaves to the man who marries his daughter. The words of the act of 1806, extend to all cases of gifts of slaves, and there is reason to believe, that the policy of the act was especially directed to gifts to a son-in-law; because they were of the most frequent occurrence, and the difficulty of ascertaining the truth in old transactions which depended on the memory of witnesses only, the litigation, uncertainty, and perjury, which they produced, seemed to call for legislative interposition.

And upon the whole case, we think the law is, that as between *Wall* and *Powell*, the mortgage-deed is effectual, without a subscribing witness, and *Wall* could not claim the negro in the face of it; so the plaintiff, who claims under *Wall*, and stands in his place, can claim only in *æquali jure*, and cannot set up a right in opposition to the deed.

Shenck v. *Hutcheson*.

This was an action of trover brought to recover the value of two fifty dollar bank notes, one on the Bank of the United States, the other on the Farmers and Mechanics' Bank of New-York, which the plaintiff alleged he had lost in October, 1812. He proved that he had in possession a fifty dollar note on the Bank of the U. States, which had been cut in two and pasted together, and looked dirty; that the defendant had passed a fifty dollar U. States note to a merchant, and the plaintiff's witness, who had seen the note in possession of the plaintiff, upon seeing it in possession of the merchant, believed it to be the same note which he had seen the plaintiff have; that he had possessed several fifty dollar notes on one of the Banks of the State of New-York, not long before the alleged loss; that the defendant had been seen to have a fifty dollar note on a Bank in New-York, as well as the one

passed to the merchant; that upon the defendant's being asked where he had gotten the notes, he said he had won them from a certain man by the name of *Wauhop*, who had exhibited wax figures at Lincolnton, in January, 1813. The deposition of *Wauhop* was taken, who swore that he did not play at cards or gamble with said Hutcheson in any way, or let him have any money. The plaintiff further proved, that the defendant offered two fifty dollar notes to a man who handled a great deal of money, no way connected with him, for safe-keeping. The plaintiff offered no evidence of the loss of the notes but his own declarations in Oct. 1812, and afterwards, and that the defendant had been seen hunting for the notes, as he the defendant said.

The Court charged the jury that it was proper for them to receive the declarations of the plaintiff, connected with the other circumstances, to ascertain the loss; and upon this evidence, the jury found a verdict for the plaintiff: and a new trial was moved for on the ground of a misdirection of the Court as to the evidence.

Question. Was it proper to receive the declarations of plaintiff, connected with other circumstances, to prove the loss of the notes? If proper, judgment for plaintiff; if not, a new trial to be granted—otherwise not.

SEAWELL, J. delivered the opinion of the Court:

The only point submitted to this Court is, whether it was proper to admit the declaration of the plaintiff, together with *other circumstances*, to prove the loss of the notes: And we are all of opinion that it was. For we hold, that in all cases where the *acts* of a person can be given in evidence for him, that his declarations in relation to such acts, must necessarily be admitted; as in the case of a claim, demand or tender: For in the first two cases, it is the declaration which *constitutes* the act, and in the latter, they form *part* of it.

What these "other circumstances" were, does not appear in the case; but in answer to the general question stated, it is easy to state a circumstance proper to be connected with the declaration. Such, for instance, as that the party was seen with his friends and servants diligently searching the road. It not appearing to us, therefore, that these declarations were *improperly* admitted, we can see no reason for disturbing the verdict.——Rule discharged.

Speed and others v. *Harris and others.*

The plaintiffs obtained a decree in the County Court of Wake, against the defendants as executors, for distributive shares. The defendants prayed an appeal; which was allowed. The appeal bond sent up to the Superior Court, was executed by the plaintiffs. In the Superior Court, the plaintiffs moved for leave to withdraw the bond filed with the transcript; and that the appeal should be dismissed. At the same time the defendants moved for a writ of *certiorari* in case the Court sustained the plaintiff's motion. It was referred to the Supreme Court to say what judgment shall be entered in this case.

CAMERON, J. delivered the Judgment of the Court:

The act of 1777 requires that the party appealing shall give bond, &c. In this case, the party praying the appeal, gave no bond. That given by the plaintiffs (through error no doubt) cannot be noticed for the purpose of giving the Superior Court cognizance of the suit. The appeal must therefore be dismissed for want of such a bond as the act requires from the party praying the appeal. And let a writ of certiorari issue in conformity with the defendant's motion.

Marshall v. *The Executors of Marshall.*

To this bill answers were filed, to which a replication was entered. A reference to the master had been made at a former term, and a report made by him was submitted, on the cause being called. The defendants moved to dismiss the bill for want of prosecution; on which question the cause was referred to this Court.

SEAWELL J. delivered the opinion of the Court:

When a bill is filed and an answer put in, and the complainant makes no replication to the answer, it is in the discretion of the Court to refer it to the master. And this will depend upon the nature of the subject matter, the reference being always for the relief of the Court; and not by any means necessary for the determination of any case. For the Court may, if it will, take the account itself without any reference.

In this case there was a replication to the answers, by which all charged in the bill, and denied by the answers, was put in issue. The act of Assembly establishing the Court of Equity has provided, that a jury shall form part of the Court, and that all matters of fact shall be tried by them. The complainant, therefore, although there was no report, had the right to have the opinion of the jury upon the facts in dispute, who might differ from the master upon the extent of the testimony then in,—or if there were no depositions, the complainant, according to our practice, might produce before the jury *viva voce* testimony. From this it results, that the proper course in such case would be, to set down the cause for hearing absolutely, or with such provisions as the Court, in its discretion, should deem proper, which must depend upon the conduct of all parties. Wherefore, we are of opinion, that the motion to dismiss be overruled.

Nichols v. *Palmer.*

Detinue for a slave under the following circumstances: The plaintiffs, John Nichols and Jonathan Jacocks, obtained a joint judgment, by confession, against John Drew, the former proprietor of the slave, at Bertie County Court, which begun and was held on the second Monday of November, 1810. The second Monday in the month was the 12th day of the month. An execution issued on the judgment and was levied on the slave in question, who had been run away for some time before, and was sold by the sheriff the 10th of January following, when the sale was forbid by plaintiffs. Jonathan Jacocks became the purchaser, who sold to the defendant. The plaintiff claims under a bill of sale, which *purports on the face*, to have been executed on the 10th of November, 1810.

The subscribing witness deposed, that he was called upon by plaintiff and John Drew, on the same day of Jacock's purchase, to attest the bill of sale, the said John Drew declaring that he *had* executed it on the day *it purported*, and that witness then signed his name. The bill of sale had no other witness. The subscribing witness stated, that he believed the said Drew was indebted to the plaintiff other than by the judgment, for the purchase of his crops, and that J. Drew, jr. was security to the plaintiff therefor.

Defendant then gave evidence of the declaration of the plaintiff, that he had no interest in the suit, but that it was brought for the benefit of J. Drew, jr. the security.

The jury, under the direction of the Court, gave a verdict for the defendant, and, on motion for a new trial, it is referred to the Supreme Court.

CAMERON, J.—The only question in this case is, at what time did the bill of sale for the negro in question, from J. Drew to the plaintiff, take effect?

This bill of sale being a *deed*, like all other deeds took effect from its *delivery*. The attestation of the subscribing witness on the 10th of January, 1811, is the only evidence of a delivery. There was no evidence of a delivery on the 10th of November, 1810, the day on which it *purports* to have been made, nor of any delivery between these periods of time. The defendant (or person under whom he claims) had acquired a lien on the slave under the judgment and execution, previous to the consummation of the deed under which the plaintiff claims title.

We are all of opinion, that the charge of the presiding judge was correct, and that the motion for a new trial be overruled.

Drew's Ex'rs v. *Drew*.

Detinue for three negroes. Verdict for defendant, and motion for a new trial: Upon which a rule to shew cause was granted, and the case is ordered to be sent to the Supreme Court, to determine whether there shall be a new trial granted, or not, upon the following statement.

The negroes in question were the children of negro Edna, who many years ago belonged to the plaintiff's testator; but the defendant proved a verbal gift of her to himself by the testator about sixteen or seventeen years ago. It was proven by one witness that she continued, however, in the possession of the testator, and was employed by him as his own property until his death, which happened about the month of in the year , and during that time, she had the children now in controversy. Immediately after the testator's death, the executors having taken an inventory of the estate, left the said negroes, with the other property of the deceased, in the care of the defendant, until a sale should take place, which soon afterwards happened, when the de-

fendant refused to deliver up the said negroes, and claimed them as his own property, upon which this suit was brought to this Court at April term, 1813. It was proven also in the trial, that on the day of the gift, the son, the donee, carried the slave home with him, and that she was afterwards backward and forward with the father and son, and that it was their practice for the one to assist the other in the crop, by the one who first finished, working with the other. And it was also proven, that all the children were born at the house of the father, and that he said, in allusion to the mother, "that let the possession be where it would, the property was still in the son, and that the mother would have a fine brood for the son, provided the son took care of them." The objection set up to the claim of the defendant, is a provision in the act of 1806, respecting parol gifts. In addition to the foregoing testimony, it was proven by another witness, that at different times, he saw the negroes in possession of old Drew, and never saw them in possession of any other person, and he never heard of any other title but the plaintiff's testator's.

SEAWELL, J. delivered the Judgment of the Court.

We have no difficulty in deciding this case. Whatever may be the effect of the act of limitations when a plaintiff shall endeavor to support his title by it in an action for personal property, we do not think necessary at this time to be decided, because this case steers clear of such question; and as to the clause in the act of 1806, requiring persons who claim slaves in virtue of parol gifts before that time made, to prosecute their actions within a limited time, that also must be understood to relate to *adverse* claims, and can therefore have no bearing in this case.

Whether the witnesses who deposed to the several facts stated in the case, were worthy of credit, was the peculiar province of the jury to decide. If they were believed, the

jury did right; and there is nothing in this case which shews that they ought not to have been believed. Taking the case, therefore, as it appears to *us*, whatever possession the father had, after the gift, was by the permission of the son, and in fact, according to the joint understanding of both: Such possession, therefore, was the possession of the son, and for which the son could have maintained no action, without shewing that the father claimed adversely. Wherefore, we are all of opinion, that the rule for a new trial should be discharged.

Cline v. *Lemon.*

This was an action to recover the penalty given by act of Assembly for turning public roads; and on the trial, the plaintiff proved by the records of the County Court, that an order issued in 1799, for a jury to lay off a road from the Fishdam ford on the South fork of the Catawba, to the road leading from Lincolnton to the Island ford: That they returned, "they had laid off a road from the South fork, crossing Clerk's creek at the old bridge place, to the road leading from Lincolnton to the Island ford:" And that an order issued to an overseer to open said road. The plaintiff then proved that the road was shortly after opened and had been worked on by the overseers for about fourteen years as the public road, as at first cut out, until the defendant turned it from that place and continued it turned for six months. The defendant then offered to prove by some of the jurors who laid off the road, that the road cut out by the overseer and continued, differed from their report in this—that it crossed the creek eighty poles above the old bridge place, called for in their report; and that the defendant whilst overseer, turned the road from where it had been cut out, to the old bridge place;—and that the road, as cut out at first, was complained of by some persons through whose land it passed, as not being the road laid out by the jury. The evidence of the defendant was rejected by the Court.

The plaintiff further proved, that the road first cut out was equally good and nearer than the road crossing at the old bridge place, as turned by defendant.

If the evidence offered by defendant was improperly rejected by the Court, then a new trial to be granted; if properly rejected, judgment for plaintiff.

CAMERON, J. delivered the judgment of the Court:

No principle of law in relation to evidence, is better settled, than that parol testimony in contradiction of matters of record is inadmissible. The testimony offered by defendant was in contradiction of the records of the County Court of Lincoln, confirming the report of the jury, and the road laid out by them. Such testimony was properly rejected by the presiding judge. Motion for new trial overruled.—— Judgment for plaintiff.

Holding v. *Holding*.

The defendant was served with a *sci. fa.* to show cause why a fine *nisi* imposed on him for not obeying a *subpœna*, whereby he was summoned a witness for the plaintiff in a suit between him and *Smith*, should not be made absolute. No sum was stated in the *sci. fa.* Plea: *Nul tiel record*, and *absent by consent of the plaintiff*. The last plea was negatived by the verdict of the jury; and in support of the issue to the Court the plaintiff produced a subpœna, on which was endorsed this return,——"*Executed. Edmond Prince, D. S.*"

SEAWELL, J. delivered the Judgment of the Court:

In determining this case the question necessarily presents itself, whether it appears by the return on the subpœna, that the defendant was summoned? and we are all of opi-

nion that it does not. The law considers every Court cognizant of the officer to whom it authorises such Court to direct its precepts: And when return is made, the officer is presumed, in *law*, to have come personally into Court and there to have been recognized in virtue of his *commission*: and hence it was unnecessary at common law, to make any return *upon* the writ otherwise than "executed," or the like. The statute of Edward 2, however required that the return should be made in the proper name of the sheriff. When a precept then is directed to the sheriff of a particular county and is returned, and *appears* to have been executed by a person who was sheriff, the presumption exists that he *was* sheriff, until it shall be alleged otherwise by plea; and if the party affected does any act in aid of this presumption, as by pleading to the action, he becomes forever concluded.—2 *L. Ray.* 884. 1 *Sal.* 265.

Again:—Such high confidence does the law repose in the integrity and ability of such officers, that their acts are in most instances, conclusive upon the parties; and this in consideration of the dignity presumed to be attached to the character of him who is appointed to so important an office, and of the oath also, and the sureties of such officer, truly to execute the same. But with respect to a person deputed by the *sheriff* to act for *him*, this Court cannot judicially know him, because his *authority* to act rests upon the *private* delegation of the *sheriff*; and a strong authority in this point is *Woodgate* v. *Knattchbull*, 2 *Term Rep.* 148. per *Buller Just.* and 2 *Bla. Rep.* 834.

In the present case it is not pretended that Edmond Prince, in whose name the return is made, was the sheriff; and if it was, the fact appears otherwise, by the return itself; for he signs "Edmond Prince, D. S." a character perfectly understood in this State, to mean *deputy* sheriff. The subpœna then is directed to the sheriff of Chatham, commanding him to summon the defendant, and it is *certified* to be

executed by an individual, who (to make the most of the case) certifies that he is the deputy of the sheriff.

The return of a sheriff upon a precept is upon oath, and equal to the affidavit of a respectable citizen, and that is the reason why it concludes a party; but the return in the present case, contains no greater verity than the certificate of John Doe. Prince *may* have been the deputy, and the subpœna *may* have been served; but we cannot recognize a return made in the name of any other person than the officer appointed by law. If such officers are required to make the return in their own name, then there is the security the law intended for the citizen ensured by the return.

If we were to sustain such a return, it is placing it in the power of any individual to make a return upon a precept, provided he will add, 'D. S.' There is, moreover, an incurable objection to the scire facias—no sum being stated to have accrued by the forfeiture; and in a case brought up by a judge for his *own sake*, this Court will look into every thing which *incontrovertibly* appears in the proceedings.

Wherefore, we are all of opinion, that the return of the deputy sheriff cannot be respected, and that there be judgment for defendant.

Rosseau v. *Thornberry*.

This case came up from the County Court of Wilkes, by *Certiorari*, to the last March term. No bond had been given to the Clerk of the County Court at the time of obtaining the certiorari. At the March term, when the writ and record were returned into this court, a motion was made in behalf of the plaintiff to dismiss the certiorari, for the want of a bond to prosecute it having been given by the defendant, at whose application it was obtained. Whereupon, the defendant immediately executed and filed in court a bond with suf-

ficient security, for prosecuting his writ of certiorari. And set forth on affidavit, that that was the first period at which he knew that it was his duty to file a bond. The motion to dismiss was held up for consideration until this term.

The question for the Supreme Court is, Whether the bond could be received by the Superior Court?

CAMERON, J. delivered the judgment of the Court;

The object of the act of Assembly which requires a bond to be given (according to the directions of the act) by the party obtaining a writ of *Certiorari*, is to indemnify the adverse party against the consequences incidental to the removal of the suit.

The Clerk of the County Court to which the writ goes, is directed to take from the applicant, such a bond as the act requires; if he fails in the performance of this duty, the ends of justice can no otherwise be attained than by such bond being taken in this Court, before a trial is had between the parties.

In this case, the applicant for the writ is in no fault. The omission of the Clerk of the County Court, should not drive him from the Superior Court *unheard*. He has done all that is in his power (and he has done enough) to secure his adversary, in the event of his being ultimately successful in the contest.——Let the bond be received, and the suit retained for trial.

M'Guire v. *Blair*.

This was an action on the case for words; in which the plaintiff charged in his declaration, that the defendant had spoken of him these words, to wit, "*He* (meaning the plaintiff) *one of our little Chowan justices of the peace, was taken up a few nights ago playing cards with negro Quomana,*

in a rookery box, and committed to jail, and remained there until next day nine or ten o'clock, and then was turned out, and split for the country." After a verdict for the plaintiff, it was moved, in arrest of judgment, that the words stated in the plaintiff's declaration are not actionable.

SEAWELL, J. delivered the opinion of the Court:

The words stated in the declaration to have been spoken by the defendant, are not in themselves actionable, as they impute no crime which, if true, would subject the plaintiff to infamous punishment. And it is not charged in the declaration that the plaintiff was a justice, or that they were spoken of him in relation to his office.——There must therefore be judgment for the defendant.

Beaner and Wife v. *Pilley and Wife.*

The plaintiffs brought an action of ejectment against the defendants to March Term, 1815, of Beaufort County Court. At the same term the defendants employed counsel, who appeared and entered into the common rule, &c. but the defendants did not give bond for costs, as required by act of Assembly, before making defence. For want of such bond, the plaintiff's counsel struck out from the appearance docket the plea entered for them, and entered up judgment by default final against the casual ejector. A writ of possession issued, under which the plaintiffs were put into possession. At June Term, 1815, the defendant, on an affidavit, stating "that he would have given security for the costs had he known it was necessary, and that he believes he has a good title to the lands in dispute,"—obtained a rule on the plaintiffs to show cause why the judgment should not be set aside, a writ of restitution awarded, and the defendants be permitted to plead on giving bond as required by act of Assembly. At September Term, 1815, the rule being made absolute,

the plaintiff appealed to the Superior Court, from whence the case is transferred to this Court.

CAMERON, J :—By the application of a positive statute, the defendants have been turned out of possession of the land in question, without having the judgment of a Court of Justice on the merits of their title. Such a course is at all times to be avoided, when practicable, consistently with the laws of the land and the powers of the Courts. When the suit of a plaintiff in ejectment is dismissed by the application of the same statute, the costs which he incurs is all the evil he is subjected to. He may recommence his suit and be heard on as advantageous grounds as if his *first* suit had progressed to hearing on the merits. The defendant in ejectment, who is *turned out of possession* without a trial, if compelled to become plaintiff to assert his title, loses many advantages which he possessed as defendant in possession.

New trials instituted and established as a *mean* of attaining the ends of justice, were not formerly countenanced in the action of ejectment, because the injured party might bring a new ejectment. But as the Courts became more liberal, they granted new trials in ejectment where the party applying would suffer by a change of possession ; as where the plaintiff has obtained a verdict, it makes a great difference to the defendant whether he has a new trial or is forced to become plaintiff in a new ejectment.

" We should therefore," said Lord Mansfield in the case of *Clymer* v. *Littler*, 1 *Bla. Rep.* 348. " rather lean to new trials on behalf of defendants, in case of ejectments, especially on the footing of surprise." *Runnington on Ejectment*, 398.

We are all of opinion, that the application of the defendant rests on higher grounds than if the cause had been tried, a verdict found for the plaintiffs, and a motion made for a new trial on the part of the defendant. *Audi alteram partem*, is

a maxim in the law, founded in justice and highly to be respected. The order of the County Court, making the defendant's rule on the plaintiff was correct.——Judgment affirmed.

State v. *Landreth.*

The defendant was indicted for malicious mischief, in stabbing with a butcher's knife, a mare the property of *Young*; but from the circumstances disclosed in the evidence, HENDERSON, J. before whom the cause was tried, was inclined to doubt whether the facts proved constituted the crime. He therefore recommended the jury to find a special verdict; in which it is stated, that the defendant took the mare from his corn-field, where she was damaging his growing corn, to a secret part of the county, where he inflicted the wound, with a view of preventing a repetition of the injury.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the Court:

We do not think that the facts found in this case, bring the ofience within the common law notion of malicious mischief. That seems to be confined to those cases, where the act is done in a spirit of wanton malignity, without provocation or excuse, and under circumstances which bespeak a mind prompt and disposed to the commission of mischief. It is essential, says *Blackstone*, to the commission of this offence, that it must be done out of a spirit of wanton cruelty, or black and diabolical revenge. 4 *Bl.* 244.

The conduct of the defendant was certainly highly reprehensible and barbarous, yet it was prompted by the sudden resentment of an injury, which is calculated, in no slight degree, to awaken passion: and there is a difference which

every one must feel, between an act committed under such circumstances, and one where the party goes off his own land in pursuit of an animal which had done him no injury, for the sake of exercising cruelty, or perpetrating wanton mischief.——Judgment for the defendant.

Britton, Guardian of Mary Ann White and o'hers v. *Browne.*

The bill states that the complainants are the children of John D. White, who died intestate. That administration on his estate was granted to the defendant and Jonathan Jacocks now dead. That the administrator sold all the personal estate of their intestate, and, among other things the negroes, which form the subject of this suit. That before the sale of the negroes, it was agreed on by the administrators, that they would purchase the negroes for the complainants and pay for them out of their commissions. That at the sale, the defendant declared he was purchasing in the negroes for the children of his intestate; by reason of which declaration they were purchased at £140 0 6, when at that time they were worth £1000.

The bill further states that the other administrator, Jacocks, in his lifetime, did charge himself with *one-half* of the price bid for the negroes; and conveyed by bill of sale to the complainants, all his right to them acquired or supposed to have been acquired, under the purchase aforesaid. That the defendant Browne, possessed himself of the negroes, and has remained in possession of them ever since, enjoying the labor of them. That the guardian of the complainants has tendered to him £70 0 3, being the other half of the price of the negroes, and demanded possession of the slaves and an account of the profits, &c. That the defendant has refused to receive the money and deliver up the negroes to the guardian of the complainants, &c.

The bill prays that the defendant may be decreed to convey to the complainants all his right or title to the negroes, to deliver possession of them to their guardian, and to account for the hire and profits.

The defendant by his answer admits that the negroes were sold, but alleges that a certain Exam Lawrence, who the defendant had previously requested to attend and buy the negroes for the defendant, became the purchaser for and on behalf of the defendant. That he mentioned to Jacocks, and perhaps to some others, his intention of buying the negroes and giving them to the complainants at some future day (negro boy Henry excepted) if he could settle the estate without loss or injury to himself.

He denies such agreement between Jacocks and himself as stated by the complainants. That he never intended to let them have the negro Henry; and as to the rest, they were to have them or not as defendant thought proper. That he purchased the negroes without any solicitation from the complainants; and that his declarations in their favor were voluntary without consideration. That he always meant to reserve the power of disposing of the negroes as his discretion might direct him. He further states, that he has paid $300 more than assets have come to his hands. That he is probably liable for $42.5 more, being the amount allowed the widow for one year's support—there being no crop, &c. —which allowance he is advised was not warranted by law. That, as well as he recollects, he made no declaration at the sale of the said negroes, that he was purchasing them for the complainants. He denies that any part of the purchase money was paid by or charged to Jacocks; alleges that the whole was charged to and paid by himself: admits the possession of the negroes, the tender of £70 0 3 by the guardian of complainants, but denies that he is bound to deliver up the negroes on the tender of any sum of money.

This cause was referred to the Supreme Court, on the case arising out of the bill and answer, as a case agreed.

CAMERON, J. delivered the judgment of the Court:

An administrator, by accepting the appointment conferred by the law, becomes a trustee for creditors and the next of kin of the intestate. Among the latter, he is bound to distribute the personal estate, after satisfying the claims of the former, out of it.

Entrusted by law with the management of the intestate's effects, and credited by it as *agent* for paying debts and distributing the surplus, he is forbidden by principles of just and obvious policy to *sell to, and purchase from himself.* If the law were otherwise, who would (in such case) fix the price of the article sold between the seller and the buyer, when both characters united in the same person, and he interested on *one* side only.

The negroes in question are acknowledged by the defendant, as well as stated by the complainants, to have been the property of John D. White the intestate. They constitute a part of the fund out of which his creditors, (if any there be) ought to be satisfied; the defendant could not by a purchase for himself at *his own* sale, avoid the payment of his intestate's debts, but would be liable to creditors to the full *bona fide* value of the property so sold. Nor can he by such purchase, real or pretended (it matters not which) protect himself against the claims of the complainants, but must account in like manner to them, as to creditors.

The decision of this Court must therefore be the same, whether the defendant purchased the negroes in question, upon an express declaration that he was buying them for complainants, as they allege, or for himself by his agent, as he contends.

In either point of view, we hold that he is bound to account for the negroes and to deliver the possession of them to the complainants.

Motion to dismiss the bill overruled, and the cause retained for further proceedings.

Jones v. *Thomas & Luke Ross.*

This was a writ of error to reverse a judgment of the County Court of Martin. The error assigned was, that judgment had been entered up against one defendant, in a joint action of assumpsit against two; that the jury found that one did assume, and the other did not.

The case was submitted.

TAYLOR, C. J. delivered the opinion of the Court:

The rule of the common law is free from doubt, that where, in cases of contract, an action is brought against several, which cannot be supported against all, the plaintiff cannot have judgment; because the contract proved differs from that declared on—a joint contract is declared on, a several one is proved. But this rule is altered by the act of 1789, c. 57, § 5, which provides, "that in all cases of joint obligations or assumptions of copartners or others, suits may be brought and prosecuted on the same, in the same manner as if such obligations or assumptions were joint and several." Now the plaintiff sued both, and so far treated it as a joint promise, yet the verdict of the jury has made a severance; and as no time is limited within which the plaintiff is bound to make his election, there does not seem to be any good reason why it may not be made as well after the verdict as before: In the same manner as where a joint action is brought against two upon a tort, in its nature joint and several, and upon not guilty being pleaded, a verdict is given against one

and in favor of the other, the plaintiff shall have judgment against him who is found guilty.——The judgment must be affirmed.

Sacarusa & Longboard v. *the Heirs, &c. of Wm. King.*

On the 5th of June, 1717, Governor Eden, by and with the advice of the Lords Proprietors' deputies, made a grant of a tract of land, lying on the south side of Morrahock (now Roanoake) River, to King Blount, for himself and the Tuscarora tribe of Indians.

On the 13th Dec. 1775, Whitmill Tuff-Dick, King of the said tribe of Indians, for himself and his nation, made a lease in writing under seal, of a part of the aforesaid tract, to Wm. King, for 99 years—the lease contains a covenant on the part of said Wm. King, his heirs, &c. to pay to the lessors, their heirs and successors, the yearly sum of during the continuance of the lease.

King took possession of the land described in the lease, immediately after its execution—and he, and those who claim under him, have had the undisturbed possession of said land, from that time continually up to the bringing of this suit.

In April, 1726, obtained a grant from the Lords Proprietors' deputies for the same land mentioned in the lease from the Tuscaroras to Wm. King—and on the 21st of October, 1777, the said Wm. King obtained a conveyance in fee-simple for the same land, derived from the grant of 1726.

Some of the Indians of the aforesaid tribe remained in actual possession of part of the land comprehended in the grant of 5th June, 1717, until June, 1803, when they finally removed from the said land to the state of New-York, leaving one of their tribe in the county of Martin (not on the lands granted to them) to attend to their concerns, receive their rents, &c.

After their removal from the lands so granted on the 5th of June, 1717, in June, 1803 the defendants refused to pay the rent reserved by the lease. This action was brought on the covenant contained in the lease, to recover the rents in arrear. The defendants opposed the plaintiff's claim for the rents, on the following grounds: 1. That by the act of 1748, c. 3, § 3, it is enacted, "that it shall and may be lawful for any person or persons, that have formerly obtained any grant or grants, under the late Lords Proprietors, for any tracts or parcels of land within the aforesaid boundaries (meaning the boundaries of the land described in the grant to the Indians of the 5th June, 1717) upon the said Indians deserting or leaving said lands, to enter, occupy and enjoy the same, according to the tenor of their several grants, any thing herein to the contrary notwithstanding." 2. That the Indians having removed themselves from the said land, the defendants claim the possession of that which they occupy, under the title derived from the grant of April, 1726, and not under the lease made to their ancestor by the Indians in Dec. 1775.

The jury, under the charge of the Court, found for the plaintiffs, the amount due for the arrears of rent. A motion for a new trial was made for misdirection of the Court, which being overruled, the defendants appealed to this Court.

CAMERON, J. delivered the judgment of the Court:

If the title of the Tuscarora tribe of Indians to the lands leased by them to the defendants' ancestor, depended solely on the confirmation it received by the 2 § of c. 3, acts 1748, to which the 3 § (relied on by the defendants) is added, by way of proviso, the grant and the condition annexed to it, would now be regarded as forming one *entire* contract between the sovereignty of this State and the tribe of Indians. Their title, however, rests on higher grounds. The Governor and the deputies of the Lords Proprietors, having full and competent powers for that purpose, did, by the grant of

the 5th June, 1717, vest the lands thereby granted, in the Tuscarora tribe, absolutely and unconditionally. The grant recites, that it is made "in consideration of *great services* rendered by the said tribe of Indians to the Government, and of their agreeing to relinquish all claim to other lands, which had been before allotted to them." It contains no condition by which the Indians are bound to reside actually and perpetually on it. It is a conveyance (in substance) in fee-simple, by those having power to convey, to persons capable of taking and holding lands in fee.

The acts of the General Assembly confirming their title, providing for their comfortable enjoyment of it, by prohibiting white persons from hunting and trespassing on their lands, were such as policy and justice dictated, and are entitled to approbation and support; but the proviso in § 3 c. 3, 1748, under which the defendants claim, being in derogation of rights actually vested in the plaintiffs by the highest authority, cannot be regarded, or allowed to have any weight in deciding this case.

If, however, the Assembly of 1748, had power to annex the condition contained in the proviso referred to, they had equally a right afterwards, to modify, alter, or abrogate that condition. It cannot be contended, that the aforesaid 3 § 3 c. 1748, is irrepealable, and that all which has been done by subsequent assemblies for the modification of it, is void, because repugnant to that proviso.

Pursuing the acts of Assembly on this subject, we find that by c. 16 of acts 1778, certain leases made by the Indians were rendered valid—that the lands leased to *Jones*, and to *other* persons, shall revert to, and become the property of the State, at the expiration of the leases, if the nation be extinct; and the lands now belonging to, and possessed by the Tuscaroras, shall revert to, and become the property of the State, whenever the said nation shall become extinct, or shall

entirely abandon, or remove themselves off the said lands, and every part thereof."

The lease made by the Indians to Wm. King, is within the operation of this act; and if any effect is to be allowed to legislative will on this subject, a very different appropriation is made of the land granted to the Indians, on the happening of either of the events mentioned in the act of 1778, from that made by the act of 1748, under which the defendants claim.

We further find, that by the act of 1802, c. , the Indians were authorised to lease out their unleased lands, to extend other leases. Commissioners were appointed under its authority to superintend and direct the management of their concerns; and they finally agreed by treaty with this State (with the approbation and consent of the General Government) at the expiration of the leases, to abandon all claims to the lands, to the State. It is expressly declared and provided by said act, "that the possession of the lessees shall be considered the possession of the Indians."

At the time the act of 1802 passed and took effect, the plaintiffs, either by themselves or their lessees, were in possession of all the land comprehended in the grant of the 5th of June, 1717. The General Assembly were apprized that the Indians intended to remove from it; they had agreed to renounce all claim to the land on the expiration of the leases made, and to be made under the said act, for the purpose of securing to them the full benefit of the leases; to allay their apprehensions that their removal from the land might destroy their claims to the rents secured by their leases; in short, to obviate the *very objection* made by the defendants against the plaintiff's demand, under color of the proviso in the 3d sect. 3d c. 1748, the General Assembly, with a proper regard to liberality and justice, enacted and declared that the possession of the lessees should be considered the

possession of the plaintiffs ;—In effect saying that the removal of the Indians from the land should not prejudice their claim to the rents due and to grow due on leases made and to be made by them.

Viewing this case with reference merely to the acts of Assembly passed on this subject, and admitting that the plaintiff's claim must be governed by those ; it is very clear to us that they are entitled to recover.

There is however, another ground, on which the plaintiffs are entitled to prevail. Admitting (for the sake of argument) that the fee-simple of the land comprehended in the lease, vested by the grant of 1726, the mesne conveyances under it, coupled with the actual removal of the Indians, in Wm. King, the ancestor of the defendants (on which point we give no opinion) : yet, as he accepted the lease on which this action is brought, and took possession of the land under it, he could not, and those claiming under him cannot, during the continuance of the lease, say that the plaintiffs have no right to recover the rents reserved and secured by it. Lord Coke says, " if a man take a lease of his *own land*, by deed indented, reserving rent, the lessee is concluded." *Co. Lit.* § 58. 47 B.——The Court is unanimously of opinion, that the motion for a new trial be overruled, and that there be judgment for plaintiff.

Richardson v. *The Administrator of Fleming.*

This was an action on a promissory note brought in New-Hanover Superior Court, where a verdict was entered up for the plaintiffs subject to the opinion of this Court, on the following case agreed. The defendant pleaded, "*fully administered*, *former judgment*, and *no assets ultra*," at August Sessions, 1811, of New-Hanover County Court, being the sessions at which the writ was returnable. The judgments pleaded are, one entered on the appearance docket of the same

sessions, and confessed in favor of *G. Hooper*, the other entered on the reference docket of the same sessions, and confessed in favour of *A. M. Hooper*, according to specialty filed. To the latter judgment a special replication is filed, that it was confessed *per fraudem*, and on an instrument of writing which was void for want of registration. This specialty was a bond in the penalty of £5000, conditioned to be void upon *Fleming* executing a marriage settlement, within six months after his marriage with *Mary Schaw*, whereby her estate shall be secured to her and the issue of such marriage.

The question arising from the case is, whether the judgment confessed to *A. M. Hooper* protected the assets to that amount?

Nash, for the plaintiff, cited *Bac. Abr.* 77, 2 *Saunders* 50. *Toller* 338. 1 *Term* 690. *Touchstone* 479. *Act of* 1785, *c.* 12.

Browne, for the defendant, cited *Yelverton* 196.

TAYLOR, C. J. delivered the opinion of the Court:

We do not pretend to touch the question as to the validity of this marriage settlement or contract against creditors, because it is not presented by the case or pleadings.

The only inquiry is, whether *Fleming* himself would have been bound by it without registration, if suit had been brought against him; and it is very clear that he would upon the express words of the act of 1785, c. 12, which makes such contracts void only against creditors.

Now the liability of the intestate devolved upon his administrator; and unless we could perceive some way in which he could have pleaded so as to have prevented a recovery, we must pronounce that he had a right to confess judgment, and that the assets are protected to the amount of it. The Clerk of New-Hanover Superior Court must therefore enter up judgment, according to the agreement of the parties, that the defendant has fully administered.

Richard B. Jones & wife v. *Blackledge.*

This suit is brought on a note of the defendant payable to *Geo. M. Leach*, *M. J. Spaight*, and *Frances Leach* (now the wife of *R. B. Jones*) of whom the said *Frances* is survivor.

Hugh Jones, attorney in fact for *R. B. Jones* and wife, moves for leave to dismiss the suit. This motion is resisted on behalf of the executors of *Wood*, to whose use, the endorsement of the writ states, that the suit is instituted; and who, it is alleged, are beneficially interested in the note upon which the suit is brought, and claim a right to collect the money sued for, derived from the facts disclosed in the accompanying affidavits.

The question referred to this Court is, whether *Hugh Jones*, the attorney in fact of *R. B. Jones* and wife, has a right to dismiss the suit?

TAYLOR, C. J. delivered the opinion of the Court:

It must be acknowledged that adjudications have taken place in England as well as in this State, wherein courts of law have recognized and protected the rights of the parties beneficially interested in the suit, when the nominal party has attempted to defeat them. Of these cases which have occurred in this State, it is believed that none have been decided under such circumstances as to confer on them the weight of conclusive authorities; for if they had, we should not feel ourselves justified in unsettling the law. And as to the decisions in England, they are in conflict with one which contains such forcible reasoning in favor of the opposite doctrine, as to convince us that it is founded on true principles of law, from which other cases have departed, under the influence, no doubt, of a desire in Judges to administer the real justice of every case, without reflecting on

the inconvenience and mischief likely to ensue from confounding the boundaries of law and equity. As the question now occurs for the first time in this Court, we think it right to restore the law of it to its ancient foundations, and to ground ourselves in doing so on the case of *Bauerman* v. *Radenius* in 7 *Term*, 633.

In that case Lord Kenyon observes, " our courts of law consider only legal rights: our courts of equity have other rules by which they sometimes supersede those legal rules; and in so doing they act most beneficially for the subject. We all know, that if courts of law were to take into their consideration all the jurisdiction belonging to courts of equity, many bad consequences would ensue. If the question that has been made in this case had arisen before Sir M. Hale, or Lords Holt, or Hardwicke, I believe it never would have occurred to them, sitting in a court of law, that they could have gone out of the record and considered third persons as parties in the cause. It is my wish and my comfort to stand *super antiquas vias*. I cannot legislate, but, by my industry I can discover what our predecessors have done, and I will servilely tread in their footsteps."

The Court are in this case all of opinion, that *Hugh Jones*, who claims to be attorney in fact of *R. B. Jones* and wife, ought upon verifying his power of attorney, to be allowed to dismiss the suit.

Perry v. *Fleming*.

Debt on bond to which *non est factum* was pleaded. The subscribing witness to the bond, had soon after its execution purchased the right, but without endorsement; but in order to restore his competency as a witness, signed and sealed a release of all his right to *Perry*, the plaintiff, who, not being at Court, the release was deposited in the clerk's office for his use; and the witness was allowed to prove the execution of

the bond. The defendant offered evidence of fraud in procuring the bond, practised on him by the plaintiff and the witness, which the Judge who tried the cause would not receive; on which a verdict was entered up for the plaintiff. On a motion for a new trial, the case was referred to this Court, on the points above stated.

No argument was made in the case.

TAYLOR, C. J. delivered the opinion of the Court:

We understand the principle of evidence to be well established, that the interest to disqualify a witness must exist at the time of trial; so that, if before then, the witness either removes the interest, or does all that can reasonably be expected from him to remove it, his competency is restored. The interest of the witness may arise from his being answerable to one of the parties, or that party to him, in the event of the cause being unsuccessful. A release from the party in the first case or a refusal by the witness, and a release from the witness in the latter case or a refusal by the party, alike restores the competency. This doctrine was recognized in the case of *Fowler* v. *Welford*, *Douglas* 139, where it is very sensibly observed by Mr. Justice Ashurst, "that every objection of interest proceeds on the presumption that it may bias the mind of the witness; but that presumption is taken away by proof of his having done all in his power to get rid of his interest."

As the plaintiff was not present when the cause was about to be tried, and it was necessary for the witness to divest himself of the interest, there is no way in which he could more formally and effectually do it than by depositing the release in the clerk's office for the use of the plaintiff: and such conduct does, in our opinion, bring this case within the reason and spirit of the rule, and renders the witness competent.

But on the other point in this cause, we are of opinion, that the evidence offered by the defendant of fraud in obtaining the bond, was improperly excluded. Such evidence, if true, goes in support of the plea of *non est factum*, and tends to show that the bond never had a legal existence. *Lester* v. *Zachary*, *Jan. Term*, 1814. What particular circumstances of fraud and imposition will render a bond void in law, it would be impossible to state *a priori*. They are infinitely diversified, and must of necesssity be entrusted to the sound and legal discretion of the Judge who tries the cause. For this reason alone, therefore, we all think there ought to be a new trial.

The Governor to the use of Gabie v. *Meilan, Jocelyn, and Foote.*

Debt on bond entered into by *Meilan*, as administrator of *Nathaniel W. Ruggles*, otherwise called, *Nathaniel Ruggles*, and *N. W. Ruggles*. The breaches assigned were, not making and exhibiting an inventory within ninety days ;— not truly administering and making a just account of his administration within two years. Pleas—" condition performed, and *plene administravit*."

On the trial of the cause in New-Hanover Superior Court, it was admitted that the breaches assigned had been committed ; whereupon the plaintiff, in order to show the damage he had sustained, offered in evidence the record of a recovery he had obtained against *Meilan*, as administrator of *Ruggles*. The defendant objected to this evidence, on the ground that he had been appointed administrator to *Nathaniel Ruggles*, in which form the bond was given, and that the record offered in evidence shows that a suit had been instituted against him by *Gabie*, as administrator of *N. W. Ruggles*, and judgment rendered against him as *executor*.

It was agreed by the parties that if the evidence be deemed admissible, then the following reason in arrest of judgment shall be considered as having been regularly entered, and be decided by this Court, for the sake of avoiding delay.

That the bond is made payable to *Nathaniel Alexander*, the Governor of the State and to his successors in office; whereas, it should have been made payable to the chairman of the County Court and his successors in office.

On the trial in New-Hanover, it was proved that a person named *Nathaniel W. Ruggles*, called *N. W. Ruggles*, died in Wilmington in September, 1807, and that *Meilan*, about three months after his death, took into his possession his effects, collected and paid his debts, and acted in all respects as his administrator; that no other person by the surname of *Ruggles* was recollected to have lived or died in New-Hanover County; and that no other letters of administration have been granted in that county to *Meilan*, except those before described.

TAYLOR, C. J. delivered the opinion of the Court:

This is a struggle to avoid the payment of the plaintiff's debt, upon two objections purely technical; and to be sure, if they are founded in point of law, they must prevail, whatever the justice of the case may call for otherwise.

The first objection goes to the introduction of the judgment recovered by *Gabie* v. *Meilan*, because the suit was brought against him as administrator of *N. W. Ruggles*, and the judgment was entered against him as *executor*. The inference drawn from this ground of objection is, that *Meilan* is not liable as administrator of *Nathaniel Ruggles* for a recovery had against him in a suit, which described him as the administrator of *N. W. Ruggles;* that the administration bond binds him only as the administrator of *Nathaniel Ruggles*, and he cannot otherwise be made liable.

But per *totam Curiam*, if a man will voluntarily enter into such a recognizance, it is good at common law. And judgment was affirmed." 2 *Ld. Raym.* 1460.

Upon the whole matter, therefore, the Court are of opinion, that the Clerk of New-Hanover Superior Court be directed to enter up judgment against the defendants for the sum of £5,000, the penalty of the bond, to be discharged by the payment of £594 12 9, with interest from the 1st of January, 1810, until paid.

Mariner & wife v. *Bateman & Rea.*

This was a bill in equity, the object of which was to exonerate the complainants from the payment of certain costs, and charge them upon the estate of Henry Norman, dec. which costs had been incurred from contesting the probate of the will of the said Henry, under the following circumstances.

Henry Norman made a will, in which he appointed his wife Sarah, one of the complainants, together with two other persons, his executrix and executors. This will was admitted to probate at April sessions of the County Court, in 1804, and the executors proceeded to transact the business of the estate.

At October sessions of the same year, another will was offered for probate, in which the defendant Bateman was appointed one executor, the complainant Sarah another, and the defendant Fanny Rea a devisee and legatee. The probate of this will was contested by the complainants (Sarah being now married to Mariner) but it was, after several trials in the County and Superior Court, finally established; upon which the complainants qualified as executors to it, together with the defendant Bateman. The expense of these various litigations amounted to near one thousand dollars.

TAYLOR, C. J. delivered the opinion of the Court:

Costs are made discretionary in this Court, with a view that they may follow as nearly as possible the conscience of the demand; and there is no instance of trustees being chargeable with them where they have acted fairly, although they fail in establishing a claim. 1 *Ves. jr.* 205.

The conduct of these complainants was such as might have been reasonably expected from executors who were disposed to do their duty; for seeing a will coming forward for probate at a considerable interval after the testator's death, and after the notoriety of one will being proved, it was natural to suspect the fairness of the attempt, and just to resist it, until it was established by testimony. It would be a great discouragement to executors to oppose even forged wills, if it were understood that it must be done at the private hazard of paying the costs out of their own estate, in the event of a failure. Where their conduct is wanton and litigious, and the Court can collect that from the facts of the case, it will require the application of a different rule.

All these expenses have arisen from the circumstance of the testator's having left two wills, without giving any reason to the person who had the custody of the prior, to believe that it was revoked by a subsequent one. It is equitable therefore that the costs should be paid out of his estate. Where a testator by his will has occasioned difficulties, the costs ought to be paid out of his assets. *Studholme* v. *Hodgson & al.* 3 *P. Wms.* 303. *Jotliffe* v. *East*, 3 *Bro. Ch. c.* 25. *Pearson* v. *Pearson.* 1 *Schoale & Lefroy*, 12.

Heirs of Orr v. *Ex'rs & Devisees of Irwin.*

This was a bill in equity for the specific conveyance of a tract of land, for which the bill charged that *R. Irwin* had, in his life-time, procured a grant to issue in his own name.

If the objection be founded on the idea that there were two persons of the name of *Ruggles*, that is repelled by the evidence spread upon the record in this case, and by the manner of describing him in the declaration, as *Nathaniel W. Ruggles*, otherwise called *Nathaniel Ruggles*, and *N. W. Ruggles*.

The ground of variance is equally untenable, because if any advantage could have been taken of it, the proper time was, when *Meilan* was sued as the administrator of *N. W. Ruggles*. But, instead of availing himself of the variance between the administration bond, and the way in which his intestate was described in the writ, he waived all objection on that score, and expressly admitted that he was the administrator of *N. W. Ruggles*, by confessing a judgment in that character. The objection that the judgment was rendered against him as executor, does not seem to be founded in point of fact. He is so called upon the docket, though a clerical error; but the writ describes him as administrator, and when he signs his name to the confession of judgment, he recognizes the character in which he is sued. We must therefore take it from all these proceedings, that the *Nathaniel Ruggles* upon whose effects *Meilan* administered, is the same *Nathaniel W. Ruggles*, as whose administrator he confessed a judgment to *Gabie*; to enforce which judgment is the object of the present suit. According to the plainest rules of pleading, *Meilan* is not estopped to deny this fact. Thus if a defendant omits to plead a misnomer, he may be taken in execution by a wrong name, 2 *Str.* 1218. If *A* give a bond by the name of *B*, and being sued by the name of *B*, plead the misnomer, the plaintiff may estop him by saying that he made the bond by the name of *B*. *Comyn's Dig. Abatement F.* 17.

With respect to the reason in arrest of judgment, we do not, on full consideration, think it ought to prevail. It is true, that the act of 1791, directs such bonds to be made pay-

able to the Chairman of the Court, changing in that respect the act of 1715, which directs them to be made payable to the Governor. But the act is merely directory, and does not render them void, or voidable, if taken otherwise. The defendants have then given a bond in a form which the law did not compel them to do; but it is conditioned for the most just and useful purposes, viz. to dispose of the goods of the deceased among his creditors and next of kin; and the defendants have entered voluntarily into such engagement. We think the law will lend its aid in enforcing this bond; and that in reason and principle, the case of *Johnson* v *Laserre*, is an authority for the plaintiff. "Error upon a judgment in a *scire facias*, sued in the Common Pleas by *Laserre*, upon a recognizance entered into by *Johnson* to *Laserre*, in which judgment was given for *Laserre*. *Johnson*, the defendant, in the Common Pleas, prayed there *oyer* of the recognizance and the condition, which condition recited that *Hugh Howard*, and *Thomasere*, his wife, executors of *John Langston*, had sued a writ of error returnable in the King's Bench, upon a judgment recovered in the Common Pleas by *Laserre* against *Howard* and his wife; if therefore, the said *Howard* and his wife prosecute the writ of error with effect, &c. and paid the sum recovered and also the damages and costs that should be awarded, if the judgment should be affirmed, &c. that then, &c. after which *oyer* had, the said *Johnson* pleaded in bar of the *scire facias*, the act of 16 & 17 *Car.* 2. c. 8, to prevent arrests of judgments, and superseding executions, and the proviso therein, that that act should not extend to any writ of error to be brought by an executor, &c. *per quod*, the said recognizance taken contrary to the said statute *vacua in lege existit.*— And upon demurrer, judgment was for the plaintiff *Laserre*, in the Common Pleas; and Mr. *Strange*, for the plaintiff in error, insisted that executors by the act of *Car.* 2, were not obliged to enter into recognizances upon writs of error brought by them, upon judgments obtained against them, and that this appearing to be such a recognizance, was void.

But per *totam Curiam*, if a man will voluntarily enter into such a recognizance, it is good at common law. And judgment was affirmed." 2 *Ld. Raym.* 1460.

Upon the whole matter, therefore, the Court are of opinion, that the Clerk of New-Hanover Superior Court be directed to enter up judgment against the defendants for the sum of £5,000, the penalty of the bond, to be discharged by the payment of £594 12 9, with interest from the 1st of January, 1810, until paid.

Mariner & wife v. *Bateman & Rea.*

This was a bill in equity, the object of which was to exonerate the complainants from the payment of certain costs, and charge them upon the estate of Henry Norman, dec. which costs had been incurred from contesting the probate of the will of the said Henry, under the following circumstances.

Henry Norman made a will, in which he appointed his wife Sarah, one of the complainants, together with two other persons, his executrix and executors. This will was admitted to probate at April sessions of the County Court, in 1804, and the executors proceeded to transact the business of the estate.

At October sessions of the same year, another will was offered for probate, in which the defendant Bateman was appointed one executor, the complainant Sarah another, and the defendant Fanny Rea a devisee and legatee. The probate of this will was contested by the complainants (Sarah being now married to Mariner) but it was, after several trials in the County and Superior Court, finally established; upon which the complainants qualified as executors to it, together with the defendant Bateman. The expense of these various litigations amounted to near one thousand dollars.

TAYLOR, C. J. delivered the opinion of the Court:

Costs are made discretionary in this Court, with a view that they may follow as nearly as possible the conscience of the demand; and there is no instance of trustees being chargeable with them where they have acted fairly, although they fail in establishing a claim. 1 *Ves. jr.* 205.

The conduct of these complainants was such as might have been reasonably expected from executors who were disposed to do their duty; for seeing a will coming forward for probate at a considerable interval after the testator's death, and after the notoriety of one will being proved, it was natural to suspect the fairness of the attempt, and just to resist it, until it was established by testimony. It would be a great discouragement to executors to oppose even forged wills, if it were understood that it must be done at the private hazard of paying the costs out of their own estate, in the event of a failure. Where their conduct is wanton and litigious, and the Court can collect that from the facts of the case, it will require the application of a different rule.

All these expenses have arisen from the circumstance of the testator's having left two wills, without giving any reason to the person who had the custody of the prior, to believe that it was revoked by a subsequent one. It is equitable therefore that the costs should be paid out of his estate. Where a testator by his will has occasioned difficulties, the costs ought to be paid out of his assets. *Studholme* v. *Hodgson & al.* 3 *P. Wms.* 303. *Jotliffe* v. *East*, 3 *Bro. Ch. c.* 25. *Pearson* v. *Pearson.* 1 *Schoale & Lefroy*, 12.

Heirs of Orr v. *Ex'rs & Devisees of Irwin.*

This was a bill in equity for the specific conveyance of a tract of land, for which the bill charged that *R. Irwin* had, in his life-time, procured a grant to issue in his own name.

The executors pleaded to the jurisdiction of the Court, that the lands lay in Tennessee, the Courts of which State could alone take cognizance of such a claim.

TAYLOR, C. J. delivered the Judgment of the Court:

Though it may be admitted that the decree of this Court cannot act directly upon lands, yet its power may be exercised over all those persons who are within its jurisdiction. So that if a decree should be made ordering a conveyance, the party disobeying it, might be attached for the contempt. It seems to be a well settled principle, that any contract made, or equity arising between parties in one country, respecting lands in another, will be enforced in the Chancery Courts of that country where the parties reside, or can be brought within the jurisdiction of the Court. 1 *Eq. Ab.* 133. 1 *Vern.* 75, 135, 419. 3 *Atk.* 589. 3 *Vesey, jr.* 170.

To these cases may be added, a decision made by the late *Chancellor Wythe*, in Virginia, which may be cited as equal in point of authority, if not superior to any of the British decisions, from the luminous and conclusive reasoning on which that upright and truly estimable Judge founds it.

Clarum & venerabile nomen.

His words are, " the fourth question is, whether a Court of Equity in this Commonwealth can decree the defendants, who are within its jurisdiction, to convey to the plaintiffs lands which are without its jurisdiction?

" The power of that Court being exerciseable generally over persons, they must be subject to the jurisdiction of the Court; and moreover, the acts which they may be decreed to perform, must be such as, if performed within the limits of that jurisdiction, will be effectual.

" That the defendants are subject to the jurisdiction of the Court, and amenable to its process, hath not been denied; and that a charter of feoffment containing a power of attor-

ney to deliver seisin, a deed of bargain and sale, deeds of lease and release, or a covenant to stand seised, executed in Virginia, would convey the inheritance of lands in North-Carolina, as effectually as the like acts executed in that State would convey such inheritance, hath not been denied, and is presumed, until some law there to the contrary be shewn, because the place where a writing is signed, sealed and delivered, in the nature of the thing, is unimportant.

"If an act performed by a party in Virginia, who ought to perform it, will be effectual to convey lands in North-Carolina, why may not a Court of Equity in Virginia, decree that party, regularly brought before that tribunal, to perform the act?

"Some of the defendants' counsel supposed, that such a decree would be deemed by our brethren of North Carolina, an invasion of their sovereignty. To this shall be allowed the force of a good objection, if those who urge it will prove that the sovereignty of that State would be violated by the Virginia Court of Equity decreeing a party within its jurisdiction, to perform an act there, which act, voluntarily performed any where, would not be such a violation.

"The defendant's counsel objected also, that the Court cannot, in execution of its decree, award a writ of sequestration against the lands in North Carolina, because its precepts are not authoritative there. But this, which is admitted to be true, doth not prove that the Court cannot make the decree; because although it cannot award such writ of sequestration, it hath power confessedly to award an attachment for contempt, in refusing to perform the decree. This remedy may fail, indeed, by the removal of the defendants out of the Court's jurisdiction, yet such a removal after the party had been cited, is not an exception which can be interposed to prevent a decree. A Court of Common Law may enter up a judgment against him, who, by removal of his

goods and chattels with himself, after having pleaded to the declaration, or after having been arrested, rendereth vain a *ca. sa.* or a *fi. fa.*

"From a contrary doctrine to that now stated and believed to be correct, may result both inconvenience and a failure of justice.

"1. A man agrees to sell to another, or holds in trust for another, lands in Georgia, Kentucky, or one of the new States north west of the Ohio, but he cannot be decreed to execute the agreement, or to fulfil the trust, by any tribunal but that in one of those countries, several hundred miles distant from the country *ex. gra.* North-Carolina, in which both parties, and the witnesses to prove matters of fact controverted between them, reside; like and greater inconveniencies may happen in numberless other cases; whereas a case can rarely if ever occur, the discussion of which can be so convenient to the defendant in any other, as in his own country.

"2. An agent employed to purchase lands for people intending to emigrate to America, or for others, having laid out the money deposited for that purpose with him by them, and having taken conveyances to himself, or to a friend for his use, refuseth not only to make title to his constituents, but also to discover the lands purchased. They meet with him in one of the States, and in the Court of Equity there, file a bill against him, praying for a discovery and a decree for conveyance; he excepts to the jurisdiction of the Court as to any lands not lying within that State, and denieth by answer, that any lands within that State were purchased by him for the plaintiffs, which was true. The bill in such case, according to the doctrine of the defendants' counsel in the principal case, must be dismissed, and this must be the fate of every other bill, until he shall have the good fortune to find out in what State the lands purchased are; and if they be in several States, a bill must be filed in every one. If so

this be said, the Court may compel a discovery though they proceed no farther, the answer is, that this is directly the reverse of the rule in the Court of Equity, viz. that the Court, when it can compel a discovery, will complete the remedy, without sending the party elsewhere for that purpose, and decree to be done, what ought to be done, in consequence of the discovery." *Wythe's Rep.* 143. *Farley* v. *Shippen.*

We have transcribed thus largely from the work of the *Chancellor*, because it is not in every library, and the discussion of the question, which is new in this Court, being the most able and copious we have any where met with, cannot fail to be instructive to the student, and acceptable to the practitioner, who will both be disposed to allow, that the excellence of the matter atones for the length of the extract. ——Plea overruled with costs.

Dunwoodie's Ex'ors v. *Carrington.*

Detinue for five negroes. A special verdict was found, stating the proofs and circumstances at great length; but the following extract is all that is necessary to a thorough comprehension of the points in the cause.

Warren the plaintiff, as executor of *Dunwoodie*, hired the slaves sued for two years successively to the defendant, who on the expiration of the last year, refused to restore them, resting his defence on the last will of *Henry Dunwoodie*, the plaintiff's testator, in which he devises all his property to his wife *Elizabeth* during her life, and after her death the negro *Jude*, one of those sued for and mother to the rest, to his grandson *Absalom*. To his grandson *James*, he bequeaths fifty pounds after the death of his wife, to arise out of his estate. To his son *John* one shilling; to his daughter *Nancy* one shilling; and to *Sarah Grissom* and his grand-

son *John Jackson*, the balance of his estate, after his wife's death.

Elizabeth the widow, after the death of her husband, lived with one *John Jackson*, who during her life kept *Jude* in his possession to her use, and at her death delivered her, together with the children born since the death of the testator, to the plaintiff. The widow died in 1809, and the years for which the negroes were hired to the defendant were 1810 and 1811. It was proved that the possession of the widow, or of *Jackson* for her use, was by the consent of the plaintiff.

The case was argued by *Norwood* for the plaintiff, and *Nash* for the defendant.

TAYLOR, C. J. delivered the opinion of the Court:

We take it to be very clear, that, under the circumstances of this case, it is not competent in the defendant to dispute the title of the plaintiff. As between those parties, at all events, the plaintiff is entitled to recover, because his right has been admitted by the defendant and possession taken under it. That possession he is bound to restore to the person from whom he obtained it; and cannot, with any shadow of justice, consider himself a trustee for any one, who in his conception, may have a better right to the property.

As to the assent, the general rule cannot be doubted, that where a legacy is limited over by way of remainder or executory devise, the executor's assent to the first taker will be considered an assent to all the subsequent takers or legatees. But this rule cannot prevail, where, after the death of the first taker, the executor has a trust to perform, arising out of the property, and which cannot be performed, unless the property is subjected to his control. Here several pecuniary legacies are to be raised out of the general estate

after the death of the wife, and therefore at that period, all the property bequeathed to her, must of necessity return to the executor, to enable him to perform the trusts of the will; and this point was so adjudged in this Court in the case of *Watson* from Johnston county.

Hamilton, Ex'trix, &c. v. *Shepherd, Adm'tor of Smith.*

This is an action on the case in the nature of deceit: and it is moved by the defendant's counsel that he be permitted to plead the act of 1789 barring claims against the estates of deceased persons. He does not state that he was directed by his client to make this defence, but he does state that the defendant believing the defenece open to him, has attended with the evidence necessary to support it. The suit has been depending two years; and it is submitted to the Supreme Court to say whether the plea shall now be entered, and if so upon what terms?

TAYLOR, C. J:—The Courts have of late years exercised much liberality in the practice, as it respects the addition of pleas, and the amendment of pleadings. Its general tendency is to advance the claims of justice, by putting the trial of a cause upon its merits; and as the Court may prescribe the terms of the permission, the power may be so employed as to prevent delay and tax inattention. The cases of *Reed* v. *Hester* and *Johnston* v. *Williams*, heretofore decided in this Court, are authorities for adding the plea in the present instance. It therefore may be added, upon payment of all costs up to the time of the application.

Harris v. *Peterson.*

The question reserved in this case, was upon the sufficiency of a notice to take a deposition. The notice was to

take the deposition on one of three days which were specified, viz. as days of the week and of the month, at a certain house in Putnam County, in the State of Georgia.

TAYLOR, C. J.—As the design of notice is to give the party the benefit of a cross-examination, its regularity must, in a great degree depend upon the circumstances of the case, and can oftener be tested by the dictates of good sense and sound discretion, than by any general rule applicable to all cases. It could not for example safely be laid down as a rule, that such a notice as this might be practised in all cases; for if the parties and witness lived near together, there would not only be no necessity for it, but it might tend to ensnare the party noticed, and aid the other in procuring testimony in a fraudulent manner. But where the witness lives at a great distance from the parties, and only one day is named, many accidents may intervene to prevent his arrival there; whereby the deposition is not taken, and justice is delayed. All this is avoided by naming two or more successive days; and as the witness lived in Georgia, in this case, we are of opinion that the notice was good.

Forsyth v. *M'Cormick.*

The defendant appealed from the County to the Superior Court, and executed an appeal bond, the condition of which was, "now if the said W. C. M'Cormick do prosecute this said appeal with effect, then the above obligation to be void, otherwise to pay such costs and charges, as by law in such case is required."

On a motion made in the Superior Court to dismiss the appeal for the insufficiency of the bond, the case was referred to this Court, where it was submitted without argument, and the opinion of the Court was delivered by

TAYLOR, C. J.—The provisions of the act of 1777, § 82, are so explicit on this subject as to leave no room for argument or doubt. The giving the bond and two securities in the manner directed, is in the nature of a condition precedent, for the words are, "that before obtaining the appeal;" and the condition must be for prosecuting the same with effect, and for performing the judgment, sentence, and decree, which the Superior Court shall pass or make thereon, in case such appellant shall have the cause decided against him. The condition of the bond taken in this case does not provide for performing the judgment of the Superior Court, and it would be satisfied by prosecuting the appeal with effect, and in the event of failure, paying merely the costs and charges. This omission is too substantial to be overlooked, for in reality the main purpose for which an appeal bond is required is totally unprovided for. We think that every bond must comprehend all the objects required in the act, we do not say, in the very words of the law, but substantially, they must be secured before the appeal can be rightly constituted in the appellate Court.

Let the appeal be dismissed.

AN ABRIDGEMENT

OF THE

ACTS OF THE GENERAL ASSEMBLY,

Passed in 1815.

An Act to provide a Revenue for the payment of the Civil List and contingent charges of Government for the year 1816.

THE Revenue Act of this year differs but little from the act of last year. The taxes are the same, except that the polls are reduced from 30 to 25 cents.

In case any justice appointed to take the lists of taxable property, fail to do so, the county court is to appoint another to perform the duty.

Where persons have neither given in their lands, nor the justices appointed to take the lists of taxable property have had them assessed, the sheriff shall, within the time prescribed for collecting the taxes, summon a freeholder residing near to, and acquainted with said lands, who, within five days after he shall be notified to do so, shall value said lands on oath, and shall transmit a copy of such valuation to the clerk of the county court, and give another to the sheriff. Said freeholder to receive a dollar for every tract of land thus valued, to be levied and collected at the time the sheriff collects the taxes, if not sooner paid.

A freeholder summoned by a justice or sheriff to assess land, refusing to perform the duty, to forfeit $50, one-half to the State, the other half to the county.

The better to secure the tax on pedlars, sheriffs, previous to their settlement with the comptroller, shall render to the clerks of the county courts, on oath, an account of the names of the persons from whom they shall have collected a pedlar's tax, which accounts the clerks are to forward to the comptroller.

An act to ratify and carry into effect an agreement relative to the Boundary-line between this State and the State of South-Carolina, entered into on the 2d November, 1815, &c.

§ 1. Enacts that the boundary-line between the two States shall begin at a stone set up at the termination of the line of 1772, and marked, "N. C. & S. C. Sept. 15, 1815," running thence west 4 miles and 90 poles to a stone marked "N. C. & S. C." thence south 25° west, 118 poles, to the top of the ridge dividing the waters of the North fork of Pacolet river from the waters of the North fork of the Saluda river; thence along the various courses of the said ridge (agreeably to the plat and survey) to the ridge that divides the Saluda waters from those of Green river; thence along the various courses of the said ridge to a stone set up where the said ridge joins the main ridge which divides the eastern from the western waters, which stone is marked "N. C & S. C. Sept. 28, 1815," thence along the various courses of the said ridge, to a stone set up on that part of it which is intersected by the Cherokee boundary-line run in the year 1797, which stone is marked "N. C. & S. C. 1813," and from the last mentioned stone on the top of said ridge, at the point of intersection aforesaid, a direct line south 68¼ degrees west, 20 miles and 11 poles to the 35th degree of north latitude, at the rock in the east bank of the Chatooga river, marked "Lat. 35, A. D. 1813," in all, a distance of 74 miles and 189 poles.

§ 2. The joint report, &c. of the commissioners to be recorded by the Secretary of State, in a well-bound book.

An Act providing for the appointment of Electors to vote for a President and Vice-President of the United States.

§ 1. Directs that the State be divided into fifteen districts for the purpose of chusing Electors, as follows:

Burke, Buncombe, Rutherford and Haywood.
Wilkes, Iredell, Surry and Ashe.
Mecklenburg, Cabarrus and Lincoln.
Rowan and Montgomery.
Rockingham, Stokes and Caswell,
Randolph, Guilford and Chatham.
Richmond, Anson, Robeson, Moore and Cumberland.
Person, Orange and Granville.
Wake, Johnston and Wayne.
Warren, Franklin, Halifax and Nash.
Bertie, Northampton, Hertford and Martin.
Pasquotank, Gates, Chowan, Perquimons, Camden & Currituck.
Beaufort, Edgecomb, Pitt, Washington, Tyrrell and Hyde.
Craven, Greene, Lenoir, Jones, Carteret and Onslow.
Bladen, Sampson, Columbus, Duplin, N. Hanover & Brunswick.

All persons qualified to vote for members of the House of Commons are to meet on the 2d Thursday of Nov. 1816, at their usual places of election in the several counties, and there vote for fifteen freeholders as Electors, one of whom shall reside within each of the Electoral Districts. The sheriff of each county to make return of the election to the Governor within eight days, under the penalty of £200, who, on or before the Monday before the 1st Wednesday in Dec. shall ascertain the fifteen persons elected, and notify them of their election.

§ 2. Provides the same regulations for ensuing elections.

§ 3. The fifteen persons for whom the greatest number of votes throughout the State shall be given, shall be the Electors, who shall meet at Raleigh, on the 1st Wednesday of Dec. 1816, and on the first Wednesday of Dec. next after their appointment at every succeeding election.

§ 4. Provides for elections in cases of vacancies occurring in the office of President and Vice-President.

§ 5. Any Elector chosen by his own consent, failing to attend to vote (except in case of sickness or accident) to forfeit £200.

§ 6. Provides for the Electors the same pay as members of the General Assembly.

§ 7. In case of any Elector failing to attend his duty, the Electors present shall appoint a person to supply his place.

An Act to amend an Act passed in 1808, c. 19, respecting the duties of Sheriffs.

Whenever any sheriff, constable or other officer shall return upon any writ of *fiera facias* or *venditioni exponas* to him directed, that he has made no sale for want of bidders, he shall state in his return the several places at which he hath advertised the sale, and the places at which he hath offered the same for sale. Every sheriff or coroner failing to make such specification, shall be subject to a fine of £20, and every constable for a like offence £5, for the use of the plaintiff, and be liable to indictment for a misdemeanor in office.

An Act making it the duty of Sheriffs to serve notices of taking Depositions.

§ 1. Sheriffs, by themselves or deputies, shall serve all notices of taking depositions in any suit, which may be delivered to them by either of the parties in suits, their agents or attorneys, and certify thereon the time when such notice was served, or copy left at the place of abode of such persons, and such return shall be evidence of the service. And the sheriff, or his deputy, shall deliver said notice with his return thereon, to the party at whose instance the said notice issued, his attorney, &c. on demand.

§ 2. Sheriffs neglecting to execute and return such notice, or making a false return thereon, to be subject to the same action and penalties as for neglecting to serve process directed to them from the superior court of law.

§ 3. Sheriffs to be allowed the same fees as for serving subpœnas for witnesses.

§ 4. Nothing herein to prevent a party in any suit giving notice, and proving the same as heretofore.

An Act for the relief of persons who have made entries of land with entry-takers, who have not renewed their bonds agreeably to law.

All entries of land regularly made shall be good, though the entry-taker may not have renewed his bond agreeably to law for the faithful performance of his duty. But this act shall not make good any entry made with an entry taker so failing after the county court shall have appointed a successor in consequence of such failure.

An Act to encrease the salary of the Public Printer.

The public printer to receive hereafter a salary of $100 per annum, in addition to the salary now allowed.

An Act to authorise the County Courts of this State, when they may deem it necessary, to lay a tax for the paying of Jurors of the Superior and County Courts.

The county courts shall have power to lay a tax for the purpose of paying their jurors not exceeding $1,50 nor less than 50 cents per day, and a sum equal to the daily allowance for every 30 miles travelling to and from said courts. A majority of the justices to be present when the tax is laid, which is not to exceed 10 cents on each poll, and the like

sum on every $300 value of town property and of land. To be collected as all other county taxes.

An Act making further provision in favor of the owners of Strays.

Every person who shall hereafter take up a horse, &c. as a stray, shall, at the time he gives notice to the Ranger, agreeably to the provisions of existing laws, pay to him, in addition to the fees already required, one dollar, for the purpose of having such stray advertised; and immediately after the Ranger shall be furnished with the appraisement of the persons appointed to value the stray, he shall cause an advertisement to be published for at least two weeks in the State Gazette, containing an accurate description of the stray, the value at which it has been appraised, and the name and abode of the taker-up. The dollar to be repaid by the owner at the time of receiving back his stray. If the owner of a stray shall not prove his property within 12 months, the taker-up shall be allowed one dollar in his settlement with the county.

An Act making further regulations for preserving the Health of the Sea-port Towns in this State.

§ 1. All ponds of stagnant water, all cellars, &c. containing putrid water, all dead animals lying about docks, streets, &c. all privies that have no wells under them, all slaughter-houses, all docks whose bottoms are alternately wet and dry, all accumulations of putrifying vegetable and animal substances and other filth, in the streets, &c. in any of the sea-port towns, are declared common nuisances, productive of disease, and ought to be removed.

§ 2. Persons owning lots liable to retain tide or rain water, who shall not, during the months of June, July, Aug. Sept. & October, keep them dry and free from stagnant water, shall forfeit $5 for the use of the town, for every week such

stagnant water or filth shall remain thereon: And if the owners do not remove such stagnant water or filth, the commissioners of the town may employ persons to do it, and add the expence to the fines.

An Act to declare the Jurisdiction of the Courts of Law in this State in relation to certain matters therein mentioned.

The courts of law of this State are declared to have full power to try and give judgment in all cases of forfeiture under any act of Congress, where cognizance thereof is given to the courts of record of the several States.

An Act authorising the Judges of the Superior Courts of Law to grant New Trials in Criminal Cases.

Where a defendant, in a criminal case, is found guilty, on application, a new trial may be granted, in the same manner as in civil cases.

An Act to improve the Inland Navigation of this State, so far as respects the River Roanoke and its waters.

The stockholders of the Roanoke Navigation Company, incorporated by an act of 1812, to make known to the governor, their acceptance or rejection of this amended charter, on or before the first day of March next; and if they fail to make this known on or before that day, it shall be held that they do accept this amended charter.

Places for opening books of subscription are detailed. Sucscriptions for $300,000, to be received in shares of $100 each. Books to be opened on the first of March and kept open till the first of June. The treasurer shall subscribe, on behalf of the State, in the books to be opened in the city of Raleigh, two hundred and fifty shares—equal to $25,000.

There shall be a general meeting of the subscribers on the 4th Monday of June 1816. And the acting managers shall lay before the meeting the books by them kept, containing the state of the subscriptions—and if the capital sum of $300,000 be not subscribed, the managers or any three of them may keep open the books for receiving subscriptions for the deficiency, during the continuance of the meeting, which may be adjourned from day to day until the business be finished—and if the deficiency be not then subscribed, the books may be opened from time to time for further subscriptions. If $150,000 be subscribed before the adjournment of the above meeting, the act takes effect, and the stockholders at that meeting shall elect a President and seven Directors for managing the concerns of the Company. And the President and Directors shall transmit to the Secretary of State a list of the subscribers, with the sums subscribed by each, to be recorded by him in his office. If more than $300,000 be subscribed, the subscription shall be reduced to that sum, by striking off first from the subscription of the State, then from the highest subscriber, &c.

The subscribers shall pay $10 upon each share subscribed, either at the time of subscribing, or by the meeting of the subscribers in June—and not more than $33,33 upon a share, shall be demanded in any one year thereafter. If the act takes effect, the Treasurer shall pay $10 upon each share subscribed on behalf of the State, within 30 days after the first meeting of the subscribers in June, and shall make subsequent payments as other subscribers.

The company shall be called "The Roanoke Navigation Company." The President and Directors or a majority of them are authorised to agree with persons on behalf of the Company to open and improve the navigation of Roanoke river from its source to its mouth, so far as the same lies in the State of North-Carolina, and all streams in said State running into said river. They are authorised to appoint a

treasurer, clerk, toll-gatherers, and all necessary officers, managers, and servants, and to make them a suitable compensation out of the capital and money arising from tolls. The President and Directors are appointed from year to year, subject to be removed by the stockholders in general meeting. They are re-eligible and may fill up vacancies in their body until the next general meeting of the stockholders. They shall take an oath or affirmation for the due execution of their office.

The general meeting of the stockholders shall be held on the 4th Monday in April annually. The presence of proprietors owning a majority of shares shall be necessary to constitute a general meeting. The meeting may be adjourned from day to day until a majority attend, and then from day to day until the business is finished. To their annual meetings, the President and Directors shall make report and render account of their proceedings, which being approved of, the stockholders shall give a certificate, a copy of which shall be entered upon the company books. At their annual meetings, dividends shall be declared. On any emergency, the President or a majority of the Directors may appoint a general meeting, giving one month's previous notice.

The company shall fix and regulate the tolls; but in such way that the annual amount of tolls shall not exceed 15 per cent upon the capital stock, after the payment of salaries to the officers of the company, sums required for repairs, and other incidental expenses. The Legislature may at the end of twenty-five years from the time the work shall be so far completed that produce may be transported and notice given by the company of that fact, and at the expiration of every 25 years thereafter, alter the rates of toll fixed by the company; but the Legislature shall not at any time reduce the rates of tollage so as to reduce the profits arising therefrom, below 15 per cent upon the capital stock. The President and Directors shall every 25th year after their works are completed and ready for the transportation of produce,

make return upon oath, to the General Assembly, of the amount of toll received by them for the preceding 25 years.

The canals, locks, and every work appertaining to the said navigation, with all the profits therefrom or any part thereof are vested in the proprietors, their heirs, and assigns, for ever, as tenants in common, in proportion to their respective shares: and the same shall be exempt from the payment of any tax, imposition, or assessment whatsoever. The navigation and works of the company when completed, shall be for ever thereafter considered as public highways, free for the transportation of goods, wares, and merchandize, on payment of the tolls which shall be from time to time fixed.

The President and Directors may agree for the purchase of lands, rocks, sluices, or fish-stands, through which the navigation is intended to pass. In case of disagreement, or if the owner be feme covert, under age, non compos, or out of the State, two justices, on application, shall issue a warrant to the sheriff of the county, to summon a jury of eighteen freeholders, disinterested and not related to the parties, to meet on the land to be valued. The sheriff shall summon the jury, administer an oath to each, that he will value the thing in question and consider all damages the owner may sustain in consequence of being divested of his property therein; and that he will not in such valuation spare any person through favor nor injure any person through malice or hatred. The inquisition shall he signed by the sheriff and twelve or more of the jury, and being returned to the clerk of the county to be recorded, shall be conclusive. The amount of the valuation shall be paid to the owner of the land if to be found, if he is not to be found, to the clerk of the court; and thereupon the company shall be seised in fee of the thing valued. But such condemnation shall not interfere with dwelling houses. In the same manner lands may be purchased or condemned for the erection of toll-houses, not exceeding 4 acres at each place intended for collecting tolls.

If the capital sum be insufficient, it may from time to time be increased by the company; and when books shall be opened for this increase, the proprietors of shares shall have a preference in the subscription for thirty days.

The company shall have power to purchase and hold real and personal estate—and if any person be sued for any thing done in pursuance of this act, he may plead the general issue and give this act and the special matter in evidence. The General Assembly shall not impose any restriction, duty, or impost, on commodities, manufactures, produce, or merchandize transported by said navigation: (and no distinction shall be made between the citizens of this State and those of Virginia.) But the General Assembly may make regulations respecting the inspection of produce brought down the said navigation, making no distinction as aforesaid.—None of the lands or other property of the company, other than that used for the navigation, to be exempt from taxation.

The President and Directors may, if they think it advisable, construct a turnpike road around the falls of the Roanoke, near the town of Halifax, and exact tolls for the transportation of produce along said road, until the navigation at the falls can be completed. The company may erect toll-bridges across the Roanoke and all the streams which run into it in this State.

The rights and privileges of the company extend from the mouth of Roanoke to the sources of all the streams running into it in this State. They may contract with any person or persons for improving the navigation, as soon as the company shall be organized.

Transfers of shares shall be by deed or devise, and shall be registered on the books of the company—part of a share shall not be transferred—no share shall be held in trust for the use and benefit and in the name of another, whereby the company may be challenged to answer such trust: but every

person appearing as aforesaid to be a proprietor shall be taken as to the others of the company to be such; but between the trustee and the person claiming the benefit of the trust, the common remedy may be pursued. Any proprietor, by writing under his or her hand, executed before a subscribing witness and acknowledged or proved before a justice of the peace, may depute any member to act as proxy for him or her at any general meeting or meetings. The treasurer of this State, either by himself or proxy, shall vote on behalf of the State in the meetings of the stockholders.

The several banks in this State, and other bodies, corporate and politic, are authorised to subscribe for shares.

All laws coming within the purview of this act are repealed and made void: but nothing contained in this act shall interfere with the stipulations and provisions of the act passed in the year 1811, "To incorporate a company for the purpose of cutting a navigable canal from Roanoke river and from the waters of Chowan river in this State, to some of the waters of James river in the State of Virginia, or to the Dismal Swamp Canal."

An Act concerning Cape-Fear River.

The style and title of "the Deep and Haw-River Navigation Company," is changed to that of "the Cape-Fear Navigation Company."

Books are to be opened on the first Monday of April, 1816, for receiving subscriptions for an increase of the capital stock of the company to the sum of $100,000 including the stock already owned. This capital is to be divided into shares of $100 each. The present stockholders shall deliver to the President & Directors the certificates of stock which they now hold, and receive other certificates in lieu thereof; and as to the present stockholders, new certificates may be issued for part of a share, but no subscription shall hereafter be received for part of a share.

Books shall be opened under the direction of such persons as the President and Directors of the Company shall designate and appoint for that purpose, and shall remain open till the first Monday of June, 1816, and on or before the 1st Monday of July, the books shall be returned to John Eccles and John Winslow, in Fayetteville, who with the President and Directors, or a majority of them, shall proceed to ascertain the number of shares subscribed: and if more shares are subscribed than are authorised by the act, they shall proceed to strike off, first from the subscription on behalf of the State, and then from the highest subscribers, until the sum shall be reduced to $100,000, including the present stock. If $50,000 shall be subscribed in addition to the present stock of the company, by the first Monday of June next, this act shall have effect. The books of the company are made good evidence of sales of shares which have heretofore been made or which shall hereafter be made for instalments due thereon.

The Treasurer of the State is directed to subscribe on behalf of the State 150 shares, and in the event of holding stock in the company, the State reserves the right of appointing a Director whenever the General Assembly shall think proper to make such appointment.

The subscribers shall pay $10 upon each share, either at the time of subscribing, or by the meeting of the stockholders in June or July; and not more than $33,33 cents, upon a share shall be demanded in any one year thereafter.

The stockholders in the Deep and Haw River Navigation Company shall make known to the Governor, on or before the first day of March, 1816, their acceptance or rejection of this amended charter; and if they fail to do so, it shall be deemed and taken as an acceptance thereof.

The affairs of the Company are to be managed by a President and five Directors, to be appointed annually, subject to be removed by the stockholders in general meeting. They are re-eligible and may fill up vacancies in their body until

the next general meeting of the stockholders—they shall take an oath or affirmation for the due execution of their office; they are authorised on behalf of the company to agree with persons to open and improve the navigation of Cape-Fear, and all streams which run into the same, and to appoint a treasurer, toll-gatherers, and all necessary officers, and make them suitable compensation.

The general meeting of the stockholders shall be held on 4th Monday in April annually. The presence of proprietors owning a majority of shares shall be necessary to constitute a general meeting. The meeting may be adjourned from day to day until a majority attend, and then from day to day until the business is finished. To their annual meetings the President and Directors shall make report and render account of their proceedings, which being approved of, the stockholders shall give a certificate, a copy of which shall be entered upon the company books. At their annual meetings dividends shall be declared. On any emergency, the President, or a majority of the Directors, may appoint a general meeting, giving one month's previous notice.

The company shall fix and regulate the tolls; but in such way that the annual amount of tolls shall not exceed fifteen per cent. on the capital stock, after payment of salaries to the officers of the company, sums required for repairs and other incidental charges.

The Legislature may, at the end of 25 years from the time the work shall be so far completed that produce may be transported and notice given by the company of that fact, and at the expiration of every 25 years thereafter—alter the rates of toll fixed by the company. But the Legislature shall not at any time reduce the rates of tollage so as to reduce the profits arising therefrom below 15 per cent. on the capital.

The President and Directors shall every 25th year after their works are completed and ready for the transportation of produce, make return upon oath to the General Assem-

bly, of the amount of toll received by them for the preceding 25 years.

The canals, locks and every work appertaining to the said navigation, with all the profits therefrom, or any part thereof, are vested in the proprietors, their heirs and assigns forever, as tenants in common, in proportion to their respective shares: and the same shall be exempt from the payment of any tax, imposition or assessment whatsoever. The navigation and works of the company, when completed, shall be forever thereafter considered as public highways, free for the transportation of goods, wares and merchandize, on payment of the tolls which shall be fixed from time to time.

The President and Directors may agree for the purchase of lands, rocks, sluices or fish-stands, through which the navigation is intended to pass. In case of disagreement, or if the owner be feme covert, under age, non compos, or out of the State, two justies, on application, shall issue a warrant to the sheriff of the county to summon a jury of 18 freeholders, disinterested and not related to the parties, to meet on the land to be valued. The sheriff shall summon the jury, administer an oath to each, that he will value the thing in question, and consider all damages the owner may sustain in consequence of being divested of his property therein; and that he will not in such valuation, spare any person through favor, nor injure any person through malice or hatred. The inquisition shall be signed by the sheriff and 12 or more of the jury, and being returned to the clerk of the county to be recorded, shall be conclusive. The amount of the valuation shall be paid to the owner of the land, if to be found; if he is not to be found, to the clerk of the court, and thereupon the company shall be seised in fee of the thing valued. But such condemnation shall not interfere with dwelling-houses. In the same manner, lands may be purchased or condemned for the erection of toll-houses, not exceeding four acres at each place intended for collecting tolls.

If the capital sum be insufficient, it may from time to time be increased by the company; and when books shall be opened for this increase, the proprietors of shares shall have a preference in the subscription for 30 days.

The company shall have power to purchase and hold real and personal estate; and if any person be sued for any thing done in pursuance of this act, he may plead the general issue and give this act and the special matter in evidence. The General Assembly shall not impose any restriction, duty or impost on commodities, manufactures, produce or merchandize transported by the said navigation. But the General Assembly may make regulations respecting the inspection of produce brought down the said navigation, making no distinction as aforesaid. None of the lands or other property of the company, other than that used for the navigation, to be exempted from taxation.

The President and Directors are authorised, whenever the same shall be deemed advisable by a majority of the stockholders in general meeting, to erect toll-bridges across Cape-Fear River, or any of the streams which run into the same: And for the condemnation of lands for erecting the abutments of said bridges and the erection of toll-houses, the same proceedings shall be had as are required for the condemnation of lands for canals.

The general meetings of the stockholders shall hereafter be holden in the town of Fayetteville.

The rights and privileges of the company extend from the mouth of Cape-Fear to the sources of all streams running into it.

Transfers of shares shall be by deed or devise, and shall be registered on the books of the company. Part of a share shall not be transferred. No share shall be held in trust for the use and benefit, and in the name of another, whereby the company may be challenged to answer such trust; but every person appearing as aforesaid to be a proprietor, shall be

taken as to the others of the company to be such; but between the trustee and the person claiming the benefit of the trust, the common remedy may be pursued.

Any proprietor, by writing under his or her hand, executed before a subscribing witness, and acknowledged or proved before a justice of the peace, may depute any member to act as proxy for him or her at any general meeting.

The Treasurer of the State, either by himself or proxy, shall vote on behalf of the State in the meetings of the stockholders.

The several banks in this State, and other bodies corporate and politic, are authorised to subscribe for shares.

All acts and clauses of acts which come within the purview of this act, or which give rights at variance with those given by this act, but which rights have not as yet been used and enjoyed, are repealed and made void.

LIST OF THE ACTS OF A PRIVATE NATURE.

Rivers, Canals and Roads.

An Act for cutting a Navigable Canal from the Sound of Cape-Fear River, near to the place called the Hawl-over, in New-Hanover.

To amend an Act appointing commissioners for the purpose of completing the Navigation of Neuse River, and for other purposes.

To facilitate the Navigation of Little River, in Cumberland county.

To incorporate a company for the purpose of rendering Navigable Great and Little Contentnea Creeks.

To amend the 5th section of an act to open & make navigable Fishing Creek, from the mouth thereof to Wiatt's Bridge.

To amend an act passed in 1812 to incorporate a company to build a Bridge across Trent River, near the town of Washington, &c.

To incorporate a company to make a Turnpike-Road from Pungo River, in Hyde, to the town of Plymouth.

To authorise the erection of a Draw-Bridge across Pungo River, at Loghouse Landing, in Hyde.

To regulate the working of Seines & Nets in Tar & Pamlico Rivers.

To amend an act passed in 1810, to amend several acts heretofore passed relative to obstructions for the passage of fish up Cape-Fear.

Relative to Fish-traps on the Yadkin or Pedee Rivers.

Courts, Jurors, Public Buildings, &c.

To authorise Buncombe county court to lay a tax for a new Jail, &c.

To authorise Montgomery county court to appoint a Committee of Finance to settle with the officers of said county.

To alter the times of holding the Superior Court of Orange county.

To alter the time of holding the county court of Hyde.

To amend and continue in force an act passed in 1814, to authorise the county court of Surry to appoint a Committee of Finance.

To amend the several county laws of Rutherford, respecting the Finances of said county, and for other purposes.

To amend an act passed in 1814, to provide for the settlement with the court officers of Buncombe county.

Authorising the county court of Wilkes to lay a tax for the purpose of building a new Jail, &c.

To provide for the payment of Jurors who may serve in the courts of law in Lincoln county.

To appoint commissioners to fix on a suitable & central place in Nash, for erecting a court-house and other public buildings, &c.

For the removal of the public buildings in Montgomery county.

Separate Elections.

To appoint commissioners for fixing on a suitable place for holding the separate election in Stokes county, heretofore held at John Ward's.

To alter the place of holding the separate election in Craven county.

For further regulating the separate election in Camden county.

To establish one other separate election in Iredell county, and to alter the place of holding the election heretofore held at Jacob West's.

To establish one other separate election in Lincoln county.

To establish a separate election in the county of Nash.

To establish one other separate election in Buncombe county.

To establish a separate election in Surry county, and to alter the places of holding two other separate elections.

To establish a separate election in Mecklenburg county.

For the removal of a separate election in New-Hanover county.

To establish one other separate election in Moore county.

Specifying the time of closing the elections in Chowan county.

To alter the place of holding one of the separate elections in Tyrrell.

To alter the place of holding a separate election in Chatham.

To alter the place of holding one separate election in Northampton.

To remove one of the separate elections in the county of Warren.

Regulation of Towns, &c.

Appointing commissioners for the town of Kinston, &c.

To incorporate the town of Charlotte, in Mecklenburg county.

Authorising the commissioners of the town of Halifax to sell a part of the town commons.

To alter the name of the town of Martinsborough, in Surry, to that of Jonesville, and for appointing commissioners of said town.

To enable the intendant of police and commissioners of Raleigh to supply the city with water, and for other purposes.

Appointing commissioners to lay off a town at or near the junction of Dan and May Rivers, in Rockingham county.

To establish and lay off a town in the county of Iredell.

For the regulation of the police in the town of Tarborough.

Academies.

To incorporate the Fayetteville School Association Company.

Respecting the Newbern and Iredell Academies.

The Poor.

For the relief of the Poor of Pasquotank county.

To establish a Poor-house in Guilford county.

Sheriffs.

To authorise the several persons therein named to collect the arrearages of taxes due them as late sheriffs.

To authorise W. W. Carter, late sheriff of Halifax, to collect the taxes due him in said county for 1814.

Miscellaneous.

To encourage the destruction of Wolves in the county of Ashe.

To amend an act passed in 1805, to establish the rates of Pilotage from the Swash Straddle to Camden and Edenton.

To restore to credit Charles Sutton ond others, of Stokes county.

To authorise Jonathan Parks to peddle or exhibit articles for shew, in the several counties in this State, free from tax.

To establish a charitable fund for the relief of indigent and decayed Mechanics in the town of Wilmington.